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REPORTS

OF

SIR GEORGE CROKE, KNIGHT,

OF

SELECT CASES

ADJUDGED IN THE

COURTS of KING's-BENCH and COMMON-PLEAS,

IN THE REIGN OF

CHARLES THE FIRST.

REPORTS

OF

SIR GEORGE CROKE, KNIGHT,

FORMERLY ONE OF THE

JUSTICES

OF THE

COURTS of KING's-BENCH and COMMON-PLEAS,

OF SUCH

SELECT CASES

AS WERE ADJUDGED IN THE SAID COURTS DURING

THE REIGN OF CHARLES THE FIRST.

COLLECTED AND WRITTEN IN FRENCH,

By HIMSELF;

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MASTER OF THE ROLLS.

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WITH

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AND OTHER BOOKS OF AUTHORITY,

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INTRODUCTION.

KING JAMES departed this life upon the twenty-ſeventh day of *March*, in the year of Our Lord 1625, by whoſe demiſe all the Juſtices patents (*a*) became void; whereupon King *Charles* ſignified his pleaſure to the Lord Keeper, that all in judicial places ſhould retain them as before, and be new empowered. And accordingly SIR RANDOLPH CREW, Chief Juſtice of the King's Bench, received a new writ, and SIR HENRY HOBART, Chief Juſtice of the Common Pleas, a new patent, and were ſworn *de novo*. The ſame day alſo SIR THOMAS COVENTRY, Attorney General, and SIR ROBERT HEATH, Solicitor General to the late King, had new patents ſent them, and were again ſworn. And like patents were made for the other Juſtices, with recital of their ſeveral places (as they were in antiquity), and of their removes or changes. JUSTICE JONES was ſworn one of the Juſtices of the King's Bench, and MYSELF (*b*), at the ſame time, at the Lord Keeper's houſe, was ſworn (again) one of the Juſtices of the Common Pleas; and afterwards the other Judges, as they came to *London*, took their oaths and received their patents: and although there had been a proclamation made, that all the Judges might hold and execute their ſeveral offices as formerly, yet we conceived it

By the common law the commiſſions of the judges determined by the demiſe of the crown, and could not be kept in force by *proclamation*. Pott. 97, 98.

(*a*) Dyer, 165. a. 2. Inſt. 26. 4. Inſt. 25. 4. Com. Dig. 1. 2. Hale P. C. 24.

(*b*) Cro. Jac. 699. Pref. Cro. Eliz. 6.

ſafeſt that none of us ſhould intermeddle until we were re-authorized by our new patents, and ſworn anew (*a*).

If a writ for the creation of a ſerjeant be returnable *immediatè*, and the ſerjeant appear before the chancellor in the *vacation* and is ſworn, it is illegal. Jones, 63. 1. Sid. 3.

THIS vacation SIR JOHN WALTER, Attorney to Prince *Charles* before he was King, and SIR THOMAS TREVOR, the ſaid Prince's Solicitor, were appointed the King's Serjeants, and writs directed to them returnable in Chancery; who thereupon, in the vacation, appeared before the Lord Keeper at his houſe in *Weſtminſter*, and there took the oath for Serjeants, and then alſo ſworn the King's Serjeants, and their patents were delivered them.

The ceremony of creating ſerjeants ought to be performed in a ſolemn manner, and therefore their returning in their party-coloured robes from *Serjeants-Inn* to *Weſtminſter* is not to be diſpenſed with. Poſt. 67. 375.

AFTERWARDS SIR HENRY YELVERTON received a writ to be Serjeant, returnable in Chancery the fourth day of *May* (which was the firſt day of the Term), with a warrant alſo to be one of the Juſtices of the Common Pleas; and thereupon he made ſuit to the Chief Juſtice, that he might have his robes and coif put upon him in the Treaſury of the Common Pleas, and be diſpenſed with for returning in his party-coloured robes from Serjeants-Inn to Weſtminſter, as the manner is of new ſerjeants.

The twelve judges ſhall regulate the ceremonies to be uſed on the call of ſerjeants.

UPON this occaſion, all the Juſtices and Barons met at Serjeants-Inn, by appointment of the Chief Juſtice, where SIR HENRY YELVERTON then ſhewing the reaſonableneſs of his requeſt (becauſe by the ſuddenneſs of his calling he was unprovided for the ſolemnities), cited a precedent,

(*a*) But now by 7. & 8. Will. 3. c. 27. ſ. 21. and 1. Ann. c. 8. every commiſſion, patent, or grant of any office civil or military, ſhall continue in force for ſix months after any demiſe of the crown, unleſs it be made void by the ſucceſſor in the mean time.—2. Hawk. P. C. ch. 1. ſ. 22.—See alſo 12. & 13. Will. 3. c. 2. 1. Geo. 3. c. 3. 32. Geo. 2. c. 35. 2. Geo. 3. c. 4. 5. Geo. 3. c. 47. and 19. Geo. 3. c. 65. by which the commiſſions of the Judges ſhall remain in full force during their good behaviour, notwithſtanding the demiſe of the crown, and their ſalaries fixed and made payable independent of the king.

viz.

viz. that SIR EDWARD COKE, being King's Attorney, was made Serjeant and Chief Juſtice of the Common Pleas, and ſworn in Chancery the ſame day, and then his robes and coif being put on in the Treaſury of the Common Pleas by SIR JOHN POPHAM, Chief Juſtice, and by SIR THOMAS FLEMING, Chief Baron, he was led in his party robes to the Common Pleas bar to make his count, and there took the oath of Chief Juſtice, all in one day: and he likewiſe deſired, that ſo it might be done to him. But all the Juſtices conceived it was not a precedent to be followed, being part of the ceremony for the creation of Serjeants, which ought to be performed in ſolemn manner; nor could it be convenient to ſuffer any more ſuch examples.

THEREFORE they all reſolved, that the writs of the ſaid Serjeants returnable *immediatè* to appear in the Vacation, and then ſwear them at the Lord Keeper's houſe, was not legal and according to the courſe of law; for although the Chancery be always open to purchaſe general writs, or try matters of equity, to have writs returnable *immediatè*, yet this writ, which is of ſo high a nature as to command *ad comparendum et recipiendum ſtatum et gradum Servientis ad legem*, ought to be made returnable at a day certain in Term, and not in the Vacation, when a day cannot be prefixed (as of neceſſity ought to be) for the performance of all the ceremonies requiſite for that calling.

The writ for the creation of a ſerjeant ought to be made returnable on a day certain in term, and not in the vacation. Poſt. 211.

WHEREUPON they moved the Lord Keeper to have other writs directed to them, to take the ſaid eſtate and degree, returnable in Chancery *May* the 4th, being the firſt

If the creation of a ſerjeant be void, he may be required *de novo* to take the ſame ſtate and degree. 1. Sid. 3.

of this Term; which was done accordingly, and they ſworn there by agreement amongſt themſelves in this order:

The order of ſwearing in ſerjeants may be ſettled by agreement.

FIRST, SIR JOHN WALTER, who had a warrant to be the King's Serjeant, and appointed to be Chief Baron (in the place of SIR LAWRENCE TANFIELD, who died the 30th of *April* before).

Then SIR HENRY YELVERTON, who had been the KING's Attorney, and was ancient to them both.

Laſtly, SIR THOMAS TREVOR, who had alſo a patent to be the King's Serjeant.

A ſerjeant whom the king intends to create a judge cannot (on notice from the chief juſtice) practiſe at the bar. Poſt. 375.

On *Tueſday May* 10, in the ſecond week of the Term, the ſaid SIR JOHN WALTER, being of the Inner Temple, SIR HENRY YELVERTON, of Gray's Inn, and SIR THOMAS TREVOR, of the Inner Temple, with the benchers, readers, and others of thoſe inns of court, whereof they reſpectively had been, being attended by the Warden of the Fleet and Marſhal of the Exchequer, made their appearance at Serjeants-Inn, in *Fleet-ſtreet*, before the two Chief Juſtices and all the Juſtices of both benches. And SIR RANDOLPH CREW, Chief Juſtice, made a ſhort ſpeech to them, and (becauſe it was intended they ſhould not continue Serjeants to practiſe) he acquainted them with the King's purpoſe of advancing them to ſeats of judicature, and exhorted them to demean themſelves well in their ſeveral places. Then every one in his order made his *count*, and *defences* were made by the ancient Serjeants; and

and their ſeveral writs being read, their *coifs* and *ſcarlet hoods* were put on them, and being arrayed in their brown-blue gowns went to their chambers, and all the Judges to their ſeveral places at *Weſtminſter*; and afterward the ſaid three Serjeants, attired in their *party-coloured robes*, attended with the Marſhal and Warden of the Fleet, the ſervants of the ſaid Serjeants going before them, and accompanied with the benchers and others of the ſeveral inns of court of whoſe ſociety they had been, walked to *Weſtminſter*, and there placed themſelves in the Hall over againſt the Common Pleas bar.

The Hall being full, a lane was made for them to the bar; then (the Juſtices of the Common Pleas being only in court) they recited their ſeveral *counts*, and ſeveral *defences* made to ſeveral *counts*, and had their writs read, the firſt and third by BROWNLOWE, the chief prothonotary, and the ſecond by GOULSTON, the ſecond prothonotary. Pref. to Rep. 99. Cro. Jac. p. 2.

SIR JOHN WALTER and SIR THOMAS TREVOR gave rings to the Judges with this inſcription, "*Regi Legi ſervire Libertas.*"

SIR HENRY YELVERTON gave rings whereof the inſcription was, "STAT LEGE CORONA."

Preſently after (they all ſtanding together) returned to Serjeants-Inn, where was a great feaſt, at which SIR JAMES LEE, Lord Treaſurer, and the Earl of *Mancheſter*, Lord Preſident of the Council, were preſent.

Upon

Upon *Thurſday* the 12th day of *May*, SIR HENRY YELVERTON was made Juſtice of the Common Pleas (being the fifth Juſtice); and the ſame day SIR JOHN WALTER was ſworn Chief Baron, and SIR THOMAS TREVOR one of the Barons of the Exchequer.

Prof. 4. Rep. 30. Poſt. 125.

WHEN

WHEN theſe CASES were adjudged, theſe Perſons were Keepers of the Great Seal, Juſtices of both Benches, and Barons of the Exchequer.

KEEPERS OF THE GREAT SEAL.

AT the beginning of the reign of *Charles* the firſt, *John Williams*, biſhop of Lincoln, was keeper of the great ſeal.

Upon the 27th day of October following, the ſaid biſhop was diſcharged of that place. And upon the 30th of the ſame month, *Sir Thomas Coventry, Knight*, the king's attorney, was made keeper of the great ſeal. Poſt. 13.

Upon the 14th of January, 15. *Car.* 1. the ſaid *Sir Thomas Coventry* departed this life: and upon the 18th day thereof *Sir John Finch*, chief juſtice of the common pleas, was made keeper of the great ſeal. Poſt. 565.

Upon the 19th day of January, 16. *Car.* 1. *Sir Edward Littleton*, chief juſtice of the common pleas, was made and ſworn keeper of the great ſeal, in the place of *Sir John Finch*. Poſt. 600.

JUSTICES

JUSTICES OF THE KING's BENCH.

1. Car. 1.

Sir Randolph Crew, *Knt. Chief Juſtice.*

Sir John Doderidge, *Knt.*
Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
} *Juſtices.*

Poſt. 52. 65. IN Michaelmas Term, 2. *Car.* 1. *Sir Randolph Crew* was amoved from his place: and in Hilary Term following, *Sir Nicholas Hyde, Knight,* was made chief juſtice.

Poſt. 127. Upon the 11th of September, 4. *Car.* 1. *Sir John Doderidge* died: and upon the 9th of October following, *Sir George Croke* was removed from the common pleas, and made one of the juſtices of the king's bench.

Poſt. 225. In the ſummer vacation, *viz.* 25th Auguſt, 7. *Car.* 1. *Sir Nicholas Hyde* died: and in Michaelmas Term following, *viz.* 24th October, *Sir Thomas Richardſon,* chief juſtice of the common pleas, was ſworn chief juſtice.

Poſt. 268. *Sir James Whitlock* died in the ſummer vacation, 8. *Car.* 1.: and in Michaelmas Term following, *Sir Robert Berkley, Knight,* and the king's ſerjeant, was ſworn one of the juſtices of the king's bench.

Poſt. 393. In the Michaelmas vacation, 10. *Car.* 1. *Sir Thomas Richardſon* died: and,

Poſt. 403. In Eaſter Term, 11. *Car.* 1. *Sir John Brampſton, Knight,* was made chief juſtice.

Poſt. 600. Upon the 9th of December, 16. *Car.* 1. *Sir William Jones* died: and in Hilary Term following, *Sir Robert Heath* was ſworn one of the juſtices of that court.

JUSTICES

JUSTICES OF THE COMMON PLEAS.

1. Car. 1.

Sir Henry Hobart, *Knt. and Bart. Chief Juſtice.*
Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.* } *Juſtices.*

IN Michaelmas vacation, 1. *Car.* 1. *Sir Henry Hobart* died: and, Poſt. 28.

Upon the laſt day of Michaelmas Term, 2. *Car.* 1. *Sir Thomas Richardſon, Knight,* and ſerjeant at law, was made chief juſtice of the common pleas. Poſt. 56.

In Michaelmas Term, 4. *Car.* 1. Sir George Croke, *Knight,* advanced to be juſtice of the king's bench, *ut ſupra.* Poſt. 127.

In Hilary Term, 5. *Car.* 1. *Sir Henry Yelverton* died: and *Octabis Purificationis* following, *Sir Humphry Davenport, Knight,* was made one of the juſtices of the common pleas.

In Eaſter Term, 7. *Car.* 1. *Sir Humphry Davenport* was made chief baron of the exchequer: and in *Quindena* of the ſame Term, *Sir George Vernon* was removed from being one of the barons of the exchequer, to be one of the juſtices of the common pleas. Poſt. 211.

In Michaelmas Term, in the ſame year, *Sir Thomas Richardſon* advanced to be chief juſtice, *ut ſupra:* and the ſame Term, *viz.* 27th October, *Sir Robert Heath, Knight,* was made chief juſtice of the common pleas. Poſt. 225.

Sir Francis Harvey died in the ſummer vacation, 8. *Car.* 1.: and in the Michaelmas Term following, *Francis Crawley,* the queen's ſerjeant at law, was made one of the juſtices, &c. Poſt. 268.

In the ſummer vacation, *viz.* 14th September, 10. *Car.* 1. *Sir Robert Heath* was diſcharged of his place: and in *Tres Michaelis* following, *Sir J. Finch, Knight,* of the king's learned counſel, and attorney to the queen, was made chief juſtice of that court. Poſt. 375.

In

Poſt. 537. In Hilary vacation, 14. *Car.* 1. *Sir Richard Hutton* departed this life.

In Eaſter Term, 15. *Car.* 1. *Edmund Reve*, ſerjeant at law, was ſworn one of the juſtices of the common pleas.

Poſt. 8. 561. 565. *Sir George Vernon* died in the Michaelmas vacation, in the ſame year: and in the Hilary Term following, *Robert Foſter*, ſerjeant at law, was ſworn juſtice of the common pleas.

Poſt. 565. 567. In the ſame year and Term, *Sir John Finch* was made keeper of the great ſeal, *ut ſupra:* and *Sir Edward Littleton, Knight*, ſolicitor-general, was then made chief juſtice of the common pleas.

Poſt. 600. In Hilary Term, 16. *Car.* 1. *Sir Edward Littleton* was made keeper, *ut ſupra:* and in the ſame Term, *Sir John Banks, Knight*, attorney-general, was made chief juſtice of the common pleas.

BARONS

BARONS OF THE EXCHEQUER.

1. Car. 1.

Sir John Walter, *Chief Baron.*

Sir Edward Bromley, *Knt.*
Sir John Denham, *Knt.*
Sir Thomas Trevor, *Knt.*
} *Juſtices.*

SIR EDWARD BROMLEY died in the ſummer vacation, 3. *Car.* 1. and Poſt. 85. in Michaelmas Term following, *Sir George Vernon, Knight*, was made one of the barons of the exchequer.

In Michaelmas Term, 5. *Car.* 1. *Sir John Walter* was commanded to forbear the exerciſing of his place; yet held the ſame by his patent until his death, being upon the 18th of November, *anno* 6. *Car.* 1. *F.* 203. Poſt. 203.

In Eaſter Term, 7. *Car.* 1. *Sir Humphry Davenport*, one of the juſtices of the common pleas, was made chief baron, *ut ſupra.* Poſt. 212.

In the ſame year and Term, *Sir James Weſton, Knight*, was made one of the barons of the exchequer in the place of *Sir George Vernon*, who was advanced to the common pleas, *ut ſupra.* Poſt. 212.

In Hilary Term, 9. *Car.* 1. *Sir James Weſton* departed this life. Poſt. 339.

In Eaſter Term, 10. *Car.* 1. *Richard Weſton*, ſerjeant at law, was made one of the barons of the exchequer. Ibid.

Richard Weſton removed, 14. *Car.* 1.: and in Hilary Term, in the ſame year, *Edward Henden*, ſerjeant at law, was made one of the barons of the exchequer.

Mantiſſa.

Mantiſſa.

PAGE 181. *The King againſt* Sir John Eliot, Denzill Hollis, *and* Benjamin Valentine. *Nota*, That afterwards, in the Parliament 17. *Car.* 1. it was reſolved by the Houſe of Commons, That they ſhould have recompence for their damages, loſſes, impriſonments, and ſufferings ſuſtained for the ſervices to the Commonwealth in the Parliament 3. *Caroli*. *Vid. poſt. fol.* 604, 605, *&c.*

See 1. Com. Dig. title "ADMIRALTY," (E. 15.) page 273.

Page 296. *Reſolution upon the Caſes of Admiral Juriſdiction. Nota*, Theſe were not judicial reſolutions, and therefore not authentic. *Vide* an ordinance 12. *Aprilis*, 1647, touching the ſame.

Page 524. *The Lord* Saye's *Caſe. Nota*, The reſolution in *Mr. Hampden*'s Caſe there cited, was adjudged to be againſt law, and repealed by the ſtatute of 17. *Car. Vide poſt. page* 601.

INDEX

OF

NAMES OF CASES.

A.

	Page
ABDY's Caſe,	585
Acton *v.* Symon,	414
Adams *v.* Hilks,	164
Adams *v.* Lord Warden of the Stannaries,	333
Anonymi, 96. 139. 145. 201, 202. 229. 233. 264. 280. 297. 316. 336, 337. 339. 380. 403. 413. 464. 472: 499. 509. 561. 571. 579. 580. 596.	
Anſley *v.* Chapman,	157
Angel *v.* Cooper,	517
Appleton *v.* Stoughton,	516
Arundell *v.* Saunders,	502
Arundell *v.* Mare,	552
Arſcott *v.* Heale,	6
Aſpye *v.* Pembridge,	597
Aſcough's Caſe,	525
Atkey *v.* Heard,	219
Audley *v.* Halſey,	148
Ayleſworth *v.* Chadwell,	38

B.

	Page
Babington *v.* Wood,	180
Bachellor *v.* Gage,	188
Bacon *v.* Bacon,	601
Bagnal *v.* Knight,	553
Baker *v.* Hacking, 387. 405	
Baker *v.* Breerman,	418
Baker *v.* Willis,	476
Baldry *v.* Packard,	46
Ball *v.* Baggerley,	326
Ball *v.* Trelawny,	603
Banniſter's Caſe,	38
Barnaby *v.* Rigalt,	301
Barkham's Caſe,	507
Bardſey *v.* Clyſton,	541
Barfoot *v.* Norton,	559
Bathel's Caſe,	570
Baynes *v.* Brighton,	515
Bayly *v.* Offord,	137
Bauderock *v.* Mackaller,	330
Beale *v.* Beale,	383
Beamond *v.* Long, 208. 227	
Beare *v.* Woodley,	154
Bell's Caſe,	449
Benſon *v.* Flower,	166
Bennet's Caſe,	104
Bennet *v.* Eaſden,	55
Benſted's Caſe,	583
Bethyll *v.* Parry,	189
Berry *v.* Heard,	242
Bigot *v.* Smith,	102
Birt *v.* Manning,	425
Bland *v.* Inman,	288
Blage *v.* Gold, 447. 473	
Blunden *v.* Baugh,	302
Blyzard *v.* Barns,	307
Bodvell *v.* Bodvell,	170
Bord *v.* Cudmore,	183

	Page
Boulton *v.* Banks,	254
Boreton *v.* Nicholls,	363. 401
Bower *v.* Cooper,	486
Bradſtock *v.* Scovell,	434
Brett *v.* Read,	343
Brice's Caſe,	593
Brikenden's Caſe,	9
Brian *v.* Cockman,	322
Bryan *v.* Wikes,	572
Bryan *v.* Wetherhead,	17
Brown *v.* Taylor,	38
Brown *v.* Hancock,	115
Brooks *v.* Goring,	197
Broxhorn *v.* Dagar,	320
Bull *v.* Wiatt,	388
Bumſted's Caſe,	438. 448
Butler *v.* the Phyſicians,	256
Burgoin *v.* Spurling,	273. 283
Burgeſſes' Caſe,	365
Buſhel *v.* Yaller,	408
Burwell's Caſe,	597

C.

	Page
Calmady's Caſe,	595
Canway *v.* Aldwin,	573
Caroon's Caſe,	8, 9
Carlion *v.* Mills,	291
Caſtle *v.* Hobbs,	21
Cavendiſh *v.* Middleton,	141
Cawdry *v.* Higheley,	270
Ceeley *v.* Hopkin,	474. 480
Ceeley *v.* Hoſkins,	509
Chambers' Caſe,	133. 168
Chambers *v.* Bromfield,	601
Chamberlain *v.* Turner,	129
Chapman *v.* Chapman,	76
Chapman *v.* Allen,	271
Chapman's Caſe,	340
Chedley's Caſe,	331
Chicheſley *v.* Thomſon;	104
Child *v.* Greenhill,	553
Cholmley's Caſe,	464
Clapham's Caſe,	97
Claxton *v.* Lylborn,	522
Cleve *v.* Veer,	450. 457
Clothworthy *v.* Clothworthy,	436
Codrington *v.* Rodman,	198
Coke, Sheriff, &c.	25
Coke *v.* Younger,	16
Coke *v.* Dowze,	241
Coke *v.* Coke,	531
Cook's Caſe,	537
Collis *v.* Malon,	282
Congham *v.* King,	221
Copland *v.* Pyott,	244
Cooper's Caſe,	544
Corbet *v.* Bans,	443
Courtney *v.* Greenville,	209
Cort *v.* Biſhop of St. David's,	341. 348
Cox's Caſe,	176
Crane *v.* Crampton,	31
Crane *v.* Holland,	138
Crayford *v.* Crayford,	106
Crawley's Caſe,	567
Crew *v.* Vernon,	97
Cripps *v.* Gryſill,	37
Criſp *v.* Prat,	548
Crowley *v.* Dawſon,	204
Arth. Crohagen's Caſe,	332
Crump *v.* Barne,	31
Cule *v.* Executors of Thorn,	186
Cucko *v.* Starre,	285
Cuſack's Caſe,	128

D.

	Page
Dalby *v.* Dorthall,	553
Daly *v.* Belamie,	542
Daniel *v.* Hertford,	542
Darroſſe *v.* Newbott,	143
Davenport *v.* Penſell,	510
Davie *v.* Hawkins,	53
Dawſon *v.* Lee,	566
Decrow *v.* Jenkins,	178
Delve *v.* Clerk,	285
Denn's Caſe,	115
Dennis *v.* Payne,	551
Derbie *v.* Hemming,	593
Digbie *v.* White,	426
Dike *v.* Ricks,	335
Dodſon *v.* Lynn,	475
Done *v.* Smethier,	415
Dow *v.* Golding,	196
Down *v.* Hathwayte	416. 418

	Page
Downs v. Winterflood,	202
Dorcheſter v. Webb,	372
Drake v. Corderoy,	288
Drake v. Munday,	207
Drake's Caſe,	220
Drydon, &c. v. Yates,	585
Dunſcomb v. Smith,	164
Duncomb's Caſe,	366
Dunbar's Caſe,	349
Dymmock v. Fawcett,	393

E.

	Page
Eaton v. Ayloff,	110
Edgar v. Sorrel,	169
Edwards v. Woodden,	323
Edwards v. Rogers,	524. 543
Eliot v. Skypp,	338
Elliot and Hollis' Caſe,	181
Ellis v. Johnſon,	261
Eve v. Wright,	75
Evans and Fynches' Caſe,	473
Evans and Cottington's Caſe,	506
Evelin's Caſe,	551
Eyres v. Eyres,	51
Eyres v. Taunton,	295. 312

F.

	Page
Facy v. Long,	237. 559
Fairwether's Caſe,	348
Faveley v. Eaſton,	269. 276
Farrer v. Engliſh,	19
Farington v. Prince,	10
Farington v. Keymer,	112
Fawkner v. Bellingham,	80. 214
Fenner v. Nicholſon,	61
Fenn's Caſe,	314
Ferrer's Caſe,	371
Fines v. Norton,	278
Fiſh v. Wagſtaff,	318
Fitzherbert v. Fitzherbert,	483, 484. 487
Flight v. Craſden,	8
Flower's Caſe,	211
Flower v. Elgar,	214
Flower v. Baldwin,	217
Forger v. Sales,	147
Foſter v. Smith,	31
Fotherby's Caſe,	62
Freeman's Caſe,	579
Fryer v. Fawkenor,	164
Fulwood's Caſe,	482. 484. 488. 492
Fynch v. Lamb,	294

G.

	Page
Gee v. Freedland,	47
Geery v. Reaſon,	128
George v. Harvie,	282. 324
Gennings v. Lake,	168
Gilpin's Caſe,	161
Gilbert v. Fletcher,	179
Girling's Caſe,	446
Gobbet's Caſe,	339
Goodyear v. Flatt,	471
Goodyear v. Biſhop,	265
Goldſmith v. Sydnor,	362
Goodwin v. Moor,	161
Goodwin v. Weſt,	522. 540
Goſhawk v. Chiggell,	154
Gray v. Felder,	209
Gray's Caſe,	608
Green's Caſe,	16
Green v. Guy,	146
Green v. Lincoln,	318
Groſſe v. Gayer,	172
Gryffyth v. Jenkins,	178
Gryffyth v. Byddle,	275
Gryffyth v. Lewis,	444
Gryffyth's Caſe,	390
Gryſyle v. Whitcock,	283
Gwyn v. Gwyn,	310
Gybbs v. Wibourn,	526
Gymlet v. Sands,	391

H.

	Page
Hall v. Marſhall,	497
Halley's Caſe,	87
Halley v. Stanton,	268
Halloway's Caſe,	131
Hallyday v. Oxenbrig,	234

	Page
Haymond *v.* Dod, -	5
Harriſon's Caſe, - -	503
Harlow *v.* Wright, -	195
Harris *v.* Richards, -	272
Hart's Caſe, - -	350
Hawkins *v.* Bilhead, -	404
Hayes *v.* Hayes, - -	433
Haſtings *v.* Douglaſs, -	343
Healing *v.* Mayor of London,	574
Hearn *v.* Allen, -	57
Helier *v.* Hundred de Benhurſt,	211
Helier's Caſe, - -	175
Herbert *v.* Laughluyn, -	492
Hilton *v.* Bembridge, -	440
Hilton *v.* Pawle, -	92
Hill *v.* Thornton, -	165
Hitcham *v.* Porter, 286.	419
Hinſley *v.* Wilkenſon,	387
Hix *v.* Holingſhed, -	261
Hobert's Caſe, - - -	209
Hodges *v.* Moyſe, -	45
Hodgkinſon *v.* Wood, -	23
Holms *v.* Savill, - -	116
Holm *v.* Lucas, -	6
Holm's Caſe, - -	376
Holt *v.* Sambach, -	103
Hollingſhed's Caſe, -	229
Hopeſtill *v.* Searle, -	386
Howard's Caſe, - -	59
Howell *v.* Thomas, -	91
Hopkins' Caſe, - -	165
Houell *v.* Barns, -	382
Horn *v.* Barber, -	421
Hughs *v.* Farrer, - -	141
Hughs *v.* Bennet, -	495
Hughs's Caſe, - -	196
Hughs *v.* Harris, -	229
Holm *v.* Heylock, -	200
Humphry *v.* Knight, -	455
Humphry *v.* Stanfeild, -	469
Hyot *v.* Hoxton, -	153
Hynd *v.* Biſhop of Chicheſter,	237

I.

	Page
James *v.* Heyward, -	184
James *v.* Tutney, 497.	532
Jaxton *v.* Tanner, -	236
Jeffe's Caſe, - -	175
Jeffrys *v.* Payne, -	510
Jenkins *v.* Young, -	230
Jennings *v.* Vandeput, -	263
Jerom's Caſe, - -	74
Jeſſon *v.* Laxon, -	254
Inkerſols *v.* Samms, -	130
Johns *v.* Rowe, -	106
Johns and Robinſon *v.* Dodſworth,	192
Johns *v.* Stayner, 272.	281
Johns *v.* Stratford, -	309
Johnſon *v.* Rowe, -	265
Johnſon *v.* Davie, -	327
Ireland *v.* Blockwell, -	570
Iſham *v.* York, - -	14
Iſham *v.* Morrice, -	109
Juxon *v.* Thornhill, -	132

K.

	Page
Kadwallader *v.* Brian, -	162
Keeley *v.* Manning, -	180
Kerchevall *v.* Smith, -	285
Kendall *v.* Fox, -	145
Kenion *v.* Davies, -	487
Kelland *v.* White, -	494
Kent *v.* Steward, -	358
Kemp *v.* Barnard, -	513
Kiffyn *v.* Vaughan, -	262
Kirton's Caſe, - -	87
The King *v.* Maynard, -	231
—— *v.* Rodman, -	198
—— *v.* Sir James Wingfield,	251
—— *v.* Elliot, -	181
—— *v.* Hobart, - -	209
—— *v.* Hill, - -	232
—— *v.* Mayor of London, -	252
—— *v.* Ward, - -	266
—— *v.* Sherington, - -	311
—— *v.* Bagſhaw - 347,	361
—— *v.* Abp. of Canterbury, -	354
—— *v.* Brook, -	409
—— *v.* Mynn, -	410
—— *v.* Inh. of Epworth,	439
—— *v.* Rooks, -	491
—— *v.* Heyward, -	498
—— *v.* Freedland, - -	499
—— *v.* Dreyden, - 511,	574

	Page
King v. Lord	204
King v. Edwards,	320
King v. Coke,	384
King v. Fitch,	414, 452
Kings v. Hilton,	603
Knight v. Harvey,	25
Kniveton v. Latham,	490
Kynaſton v. Moor,	89

L.

Lacon v. Barnard,	35
Lakins v. Lamb,	235
Lancelot v. Allen,	248
Langham v. Bewett,	68, 69
Lancaſter v. Keyleygh	300
Langden v. Stokes,	383
Langford-bridge,	365
Levann's Caſe,	201
Lawrence v. Woodward,	277
Latham v. Atwood,	515
Le Marchant v. Rawſon,	274, 278
Launder v. Brooks,	561
Lawſon's Caſe,	507
Lawe v. Harwood,	140
Lewknor v. Cruchley	140
Leycroft v. Dunker,	317
Richard Lee's Caſe,	592
Lee v. Boothbye,	521
Lee v. Ruſſel	560
Levett's Caſe	538
Leyton's Caſe,	584
Lincoln's Caſe,	64
Liſter v. Homes	544
Liſter v. Bromley	286
Love v. Platers	40
Long v. Nethercote,	143
Lodge v. Hollowell,	587
London v. Alford,	575
Lloyd v. Gregory,	502
Lutterell v. Lea,	297
Lynnet v. Wood,	157

M.

Marſhall's Caſe,	9
March v. Culpepper,	70
Mariot v. Kinſman,	219
Maſham v. Bridges,	223
Mathews v. Whetton,	233
Major v. Talbott,	285
Major v. Brandwood,	260
Manning v. Fitzherbert,	271
Mackaller v. Toderick,	337, 353, 361
Mayo v. Cogſhall,	406
Mann v. Biſhop of Briſtol and Hide,	505
Martyn v. Nicholls,	573
Mead v. Perkins,	261
Mead v. Thurman,	393
Mead v. Sir John Lenthall,	587
Meredith v. Jones,	244
Merrick v. Hundred de Rapeſgate,	379
Mildmay's Caſe,	59
Mills v. Mills,	239, 241
Miller v. Manwaring,	397
Middlemore v. Goodale,	503, 505
Mints' Caſe,	596
Morrice v. Prince,	520
Morrice v. Fletcher,	53
Morley v. Bp. of Chicheſter	67
Morley v. Pragnell,	510
Moor, v. Hodges,	90
Morant v. Cummin,	94
Morgan v. Green,	187
Morgan's Caſe,	383
Mott v. Butler,	236
Mounſon v. Cleyton,	255
Mounſon v. Bourn,	519, 526
Moulin v. Dalliſon,	484
Moyſer v. Gray,	446
Mulcarry v. Evres,	511
Mynn v. Coughton,	109
Mynn v. Hynton,	329

N.

Naſh v. Preſton,	190
Needler v. Symnel,	417
Netter v. Brett,	391, 395
Nevil v. South,	286
Nevinſon v. Whitley,	501
Newport v. Mildmay,	307
Nichols v. Walker,	394
North v. Wingate,	559
Norton v. Acklane	580
Norton v. Fermer,	113

Page

O.

Orm v. Pemberton, - 589
Owen v. Thomas ap Rees, - 94
Owen v. Long, - - 572
Oxford v. Rivet, - 79, 93
Oxford v. Waterhouſe, - 574

P.

Page's Caſe, - - 332
Palmer v. Knight, - - 385
Parker v. Grigſon - - 282
Parker v. Taylor, - 316
Parker v. Bleeke, - - 568
Parker's Caſe, - - 583
Peacock v. Steer, - 29
Peele's Caſe, - - 113
Peto v. Pemberton, - 101
Pembrook v. Boſtock, - 173
Pewe's Caſe, - - 183
Pewe v. Jefferys, - 456
Penſon v. Gooday, - 327, 329
Peck v. Ambler, - - 349
Peard v. Johns, - - 382
Perry v. Diggs, - - 494
Perkinſon v. Gilliford, - 539
Pelham v. Hemming, - 594
Phelps v. Lane, - 92
Pilchard v. Kingſton, - - 202
Pigot v. Pigot, - - 531
Platt v. Plummer, - - 24
Player v. Warn, - 54
Plowden v. Oldford, - 582
Powell v. Plunket, - 52
Powell v. Sheen, - - 531
Poynter v. Poynter, - - 194
Porter v. Hutchman, - 315
Porter's Caſe, - - 461
Prieſt v. Wood, - - 301
Prigion's Caſe, - 341, 350
Price v. Parkhurſt, - 420
Prinſor's Caſe, - - 602
Proctor v. Chamberlain, - 564
Prowſe's Caſe, - - 389
Pruett v. Drake, - - 300
Purchaſe v. Jeggon, - 78
Pyne's Caſe. - - 117

Page

R.

Randall v. Scory, - - 313
Reymund v. Hundred de Oking, 37
Reymund v. Burbage, - 580
Reynell v. Champernoon, - 228
Reve v. Malſter, - 410
Reve v. Digby, - - 495
Reignald's Caſe, - 63
Rhemes v. Humphreys, - 254
Roe v. Devys, - - 563
Rowden v. Malſter, - 42
Rolt v. Sharp, - - 77
Royſon's Caſe, - - 146
Rockey v. Huggens, - 220
Robenſon v. Cleyton, - 240
Roſe v. Bertlett, - 292
Roboldham v. Vanlech, - 378

S.

Savern v. Smith, - - 7
Sands v. Trefuſes, - 575
Sands v. Trevilian, - 107, 193
Say and Seal v. Stephens, - 135
Say's Caſe, - - 524
Salvin v. Clerk, - - 156
Salmon v. Percivall, - 196
Savill's Caſe, - - 205
Sankill v. Stocker, - - 224
Sanders v. Corniſh, - - 230
Sacheverill v. Porter, - 482
Salter v. Brown, - - 436
Saliſbury v. Hunt, - - 581
Scavage v. Hawkins, - - 571
Seagood v. Hone, - - 366
Seaman v. Bigg, - - 480
Seel's Caſe, - - 557
Shalmer v. Foſter, - 177
Shepheard's Caſe, - - 190
Sharp's Caſe, - - 352
Sherman v. Lylly, - 597
Sidley v. Mondford, - - 63
Simms v. Smith, - 176, 299
Skevill v. Avery, - 138
Slater's Caſe, - - 470
Slocomb's Caſe, - - 442
Sloper v. Child, - 595
Smart v. Eaſdale, - 199

	Page
Smith v. Craſhaw,	15
Smith v. Trynder,	22
Smith v. Wade,	32
Smith v. Richardſon,	33
Smith v. Aſhe,	58
Smith v. Ex. of Poyndrell,	97
Smith v. Norfolk,	225
Smith v. Hodgeſkins,	276
Smith's Caſe,	465
Smith v. Smith,	410, 421, 425
Smith v. James,	574
Smith v. Smith,	507
Smith v. Cooker,	512
Smith v. Roſley,	529
Snape v. Norgate,	167
Snape v. Turton,	472
Snowd's Caſe,	321
Southley v. Price,	247
Southold v. Daunſton,	269
South v. Griffyth,	481
Spalding v. Spalding,	185
Sparrow v. Matterſock,	319
Spirt v. Bence,	368
Spencer v. Medbourn,	420
Spooner v. Day,	432
Sprig v. Rawlinſon,	554
Stanford v. Cooper,	102
Star v. Buckhold,	309
Stephens v. Potter,	99
Stephens v. Facone,	379
Stephens' Caſe,	566
Stephenſon's Caſe,	389
Stile v. Fynch,	381
Stirlie v. Hill,	285
Stringer's Caſe,	599
Stroud v. Hoſkins,	208
Stone v. Linger,	467
Stone v. Newman,	427, 460
Stockman v. Hampton,	441
Stonehouſe v. Corbet,	381, 400
Sutton's Caſe,	63
Swayn v. Rogers,	32
Swayn v. Stephens,	245, 333
Swyft v. Eyres,	546
Symonds v. Mewdeſworth,	193
Symonds v. Green,	408
Symonds v. Seabourn,	325
Sydenham v. Parr,	486
Sybthorp's Caſe,	417
Sydown v. Holm,	422

T.

	Page
Taylor v. Page,	116
Taylor v. Starkey,	192
Taylor v. Willis,	219
Talory v. Jackſon,	523
Tankerſley v. Robinſon,	163
Taverner v. Skingle,	226
Terrey's Caſe,	564
Thorowgood v. Collins,	75
Thorſby v. Warren,	159
Thornton v. Lyſter,	514
Thorn v. Shering,	586
Topſall v. Edwards,	163
Townley v. Chaloner,	312
Townſend v. Hunt,	408
Tolſon v. Clerk,	438
Tomlings v. Brett,	517
Torle's Caſe,	582
Tredymmock v. Perryman,	259
Tregmiell v. Reeve,	437
Tregoſe v. Wennell,	594
Turner v. Lee,	471
Turner v. Palmer,	74
Tutter v. Hundred de Dacorn,	41
Tufton and Aſhley's Caſe,	144
Tyler v. Wall,	228
Tyndail's Caſe,	252
Tylden's Caſe,	264, 291
Tyffyn v. Wingfield,	325
Tyffin's Caſe,	426

V.

	Page
Udall v. Tyndall,	28
Venables' Caſe,	10
Veſey v. Harrys,	328
Vincent v. Leſney,	18
Vivian v. Shipping,	384

W.

	Page
Walker v. Riches,	162
Walker v. Lamb,	258
Ward v. Uncorn,	216
Ward v. Pettifer,	362
Walſh v. Biſhop,	239, 243

	Page
Watts *v.* Baker,	264
Waller *v.* Sands,	274
Waller's Case,	373
Watkinson *v.* Turner,	594
Westley *v.* Allen,	94
West *v.* Treude,	187
Weeks' Case,	203
Wells *v.* Some,	240
Webb *v.* Nicholls,	459
Whyte *v.* Ryfden,	20
Whyte *v.* Hanby,	525
Whytacres *v.* Hamkinson,	73
Whitmore *v.* Porter,	88
Windsor *v.* Hun. de Farnham,	40
Wilcocks *v.* Bradell,	73
Withipole's Case,	134, 147
Wicks *v.* Shepheard,	155
Wilson *v.* Chambers,	262
Wickham *v.* Enfeild,	351
Wilkinson *v.* Merryland,	447, 449
Wincheſter's Case,	504
Williams' Case,	595
Woolf *v.* Hole,	91
Woolner *v.* Hold,	489
Woolnough's Case,	552

Y.

	Page
Yates *v.* Dryden,	589
Young *v.* Fowler,	555
Young *v.* Young,	86
Young *v.* Pride,	89
Young *v.* Stowell,	279

THE

Eaſter Term.

1. Car. 1. In the Common Pleas.

Sir Henry Hobart, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Thomas Coventry, *Knt. Attorney General.*

Sir Robert Heath, *Knt. Solicitor General.*

Vernon Hamond *againſt* Dod. *Moore* CASE 1.

On a covenant for *quiet enjoyment*, if the plaintiff aſſign for breach (*a*) that he was *euſted* without ſhewing that it was by *elder title*, it is bad.

DEBT upon an obligation conditional, reciting, "WHEREAS "ſuch copyhold lands were to be ſurrendered by *A. S.* at "her full age to the uſe of the ſaid *Hamond* and *Gay*, and "their heirs, and that *Gay* ſhould pay to *Hamond* thirty-three "pounds at ſuch a day, and if he failed, it ſhould be to the uſe of "*Hamond* and his heirs; IT WAS CONDITIONED, that if the ſaid "obligor procure the ſaid *A. S.* at her full age to ſurrender to the "uſe of *Hamond* and his heirs, and if *Hamond* and his heirs might "have and enjoy the ſaid lands to him and his heirs, that then, &c."

The defendant pleaded, that *Gay* did not pay the thirty-three pounds; and that the ſaid *A. S.* came of full age ſuch a day, and afterwards at ſuch a court, in full court, did ſurrender, releaſe, and quit claim to the now plaintiff, being in poſſeſſion, all her right, eſtate, and intereſt in the ſaid tenements, &c. and that the plaintiff always after might have enjoyed the ſaid tenements, &c.

The plaintiff replies, *quòd bene et verum eſt* that the ſaid *A. S.* did ſurrender, &c. *prout*; but that afterward, *viz.* on ſuch a day, the ſaid *Gay* entered and expelled him, &c. Whereupon the defendant demurs.

And now this Term it was moved by ATHOE, *Serjeant*, that this replication was good, without ſhewing that the expulſion was for title, becauſe by the obligation he hath taken upon himſelf to defend againſt all titles. *Vide* 2. *Edw.* 4. *fol.* 15. If a replication be not good, yet if the bar be ill in ſubſtance, judgment ſhall be for the plaintiff. 3. *Co.* 52. *Ridgway's Caſe.*

But IT WAS RESOLVED, that this replication is not good, becauſe he hath not ſhewn that he was evicted by lawful title; for otherwiſe the bond doth not extend to it. *Vide Dyer*, 328. *and* 26. *Hen.* 8. f. 3.

Dyer in marg. 328. 4. Co. 80. b. Co. Lit. 384. 8. Co. 120. b. 133. Moor, 861. Hob. 14. 35. Cro. Jac. 133. 315. 425. Cro. Eliz. 213. 914. 823. Yelv. 30. 2. Shower, 425. 1. Leon. 246. 2. Saund. 180. 3. Mod. 135. 2. Vent. 62. 1. Lev. 83. 3. Lev. 305. 2. Lev. 37. Vaugh. 120. 123. 5. Com. Dig. 44. 85. Dougl. 685. 1. Term Rep. B. R. 672. 5. Term Rep. 584.

(*a*) By 8. & 9. Will. 3. c. 11. f. 8: "In "all actions upon bond, or on any penal "ſum for non-performance of any cove- "nants or agreements in any indenture, "deed, or writing, the plaintiff may aſſign "as many breaches as he ſhall think fit." *Vide* Comyn's Rep. 376. 2. Black. Rep. 1190. Dougl. 50. Cowp. 357.

Stating a surrender in court, without saying *to the use, &c.* is sufficiently certain in *a bar*. Post. 63. 195. Co. Lit. 303. a. 5. Co. 121. a. 8. Co. 133. b.

IT WAS ALSO HELD, that the bar, *viz.* "that she surrendered "and released in court," is good and certain enough, according to common intendment. And although it be not said that she surrendered "to the use of the plaintiff," yet being alledged to be surrendered and released in court, and accepted by the plaintiff, and confessed in the replication, it was a surrender to the use, &c. and good enough, &c.

Plowd. 102. 5. Com. Dig. 72. Cowp. 682. Dougl. 158.

CASE 2.

Holme *against* Lucas.

A declaration in *assumpsit* must shew the certain cause of the promise. *Vide* post. 31. 415. Hob. 5. 284. 10. Co. 77. a. Cro. Jac. 207. 213. 548. 642. Cro. Eliz. 240. 1 Sid. 182. Noy, 146. 1. Bulst. 153. 1. Show. 347. 1. Com. Dig. 152. 4. Bac. Abr. 14.

ASSUMPSIT. The declaration and writ were, "*quòd cùm in-* "*debitatus fuit*" to the plaintiff in fifteen pounds; in consideration whereof he assumed to pay unto the plaintiff the said fifteen pounds, &c.

The defendant pleaded *non assumpsit*; and found for the plaintiff.

It was now moved in arrest of judgment, that this declaration is not good, because it is generally *indebitatus assumpsit*, and doth not shew for what cause, *viz.* for merchandize sold, or money lent, or for other causes which lie in contract: for if it were *indebitatus* by judgment, or by specialty, which lies not in contract, an *assumpsit* in consideration thereof would not lie; because damages recovered in an *assumpsit* cannot be a bar to a debt upon a record or specialty.

HENDEN, *Serjeant, for the plaintiff*, agreed, that such a declaration had not been good if the defendant had demurred to it: but having now pleaded *non assumpsit*, and the jury having found *quòd assumpsit*, it shall be intended, that he assumed for such a debt which lieth in *assumpsit*; and therefore the defendant hath made his declaration good. And as to this point, divers precedents have been in this court, that after verdict it hath been held good; and the plaintiff had judgment: and many precedents were alledged to have been the other way, in the king's bench and exchequer-chamber.

It was appointed, that precedents on both sides should be searched; and in the mean time, *Curia advisare vult* (*a*).

(*a*) Resolved, that the omission is not aided by the verdict. post. 31. and see Avery *v.* Hoole, Cowp. Foster *v.* Smith. 826. Dougl. 4. 727.

CASE 3.

Arscott *against* Heale.

In the Exchequer Chamber.

In DEBT against *three* obligors, *one* pleads *solvit ad diem*. Replication, that neither the *three* nor any *one* of them had paid. On issue joined, verdict that *the one* had not paid is good. Post. 25. 54. 78. Co. Lit. 227. a. 2. Roll. Abr. 705. Hob. 49. 54. 119. Cro. Jac. 71. 5. Com. Dig. 167.

ERROR of a judgment in the king's bench, in DEBT upon an obligation of two hundred pounds, conditioned for the payment of one hundred pounds by *John Arscott*, *John Chichester*, and *John Vigniers*, or any of them, they being all jointly and severally obligors.

The defendant *John Arscott* pleads, that he paid it at the day.

The plaintiff replies, that "neither the said *John Arscott*, *John* "*Chichester*, nor *John Vigniers*, *nec eorum aliquis*, had paid the said "hundred pounds at the day, *et hoc petit, quòd inquiratur, &c. et præ-* "*dictus* JOHANNES ARSCOTT *similiter*."

The

ARSCOTT *againſt* HEALE.

The jury found, that the foreſaid *John Arſcott* had not paid the ſaid hundred pounds, as the defendant had pleaded; and thereupon judgment was given for the plaintiff. And the error aſſigned was, Becauſe the verdict was not according to the iſſue, for it might be paid by any of the others; which had ſufficed.

But THE COURT held it to be well enough, for the addition of *John Chicheſter* and *John Vigniers* (not mentioned in the bar) was but ſurpluſage; and their finding that *John Arſcott* did not pay the money is ſufficient: and it ſhall not be intended that any of the other two had paid it, when the defendant ſaith that he himſelf paid it. And if it had been proved that any of the other two had made the payment, the jury ſhould have been directed to find that the defendant had paid it by ſuch, &c. Whereupon judgment was affirmed.

Saverne *againſt* Smith.

CASE 4.

In the Exchequer Chamber.

ERROR of a judgment in an ejectment. Upon a ſpecial verdict the caſe was, That *John Dix*, being a copyholder in fee of the manor of *Swaffling*, had iſſue two daughters, *Agnes* married to *John Smith*, and *Margaret* married to *William Reve*, and died ſeiſed. *William Reve* made a leaſe for ten years of *Margaret*'s part without licence, and againſt the cuſtom of the manor; which being preſented by the homage as a forfeiture, the lord ſeized upon it, and granted it to the ſaid *John Smith* and his heirs. Afterward *William Reve* died, having iſſue *Nicholas*, who entered, and let to the plaintiff for three years. The plaintiff entered, and was ejected by the defendant, who claims under the ſaid *John Smith*. *Et ſi ſuper totum materiam, &c.*

Qu. If judgment in ejectment *de integris tenementis*, where it ought to have been only for *a moiety*, is erroneous?

See Runnington on Eject. 109. 111. 125. 5. Com. Dig. 278.

The judgment was entered, "*pro eò quòd videtur Curiæ*, that the "defendant was guilty of the treſpaſs and ejectment aforeſaid, *modo* "*et formâ prædict.* as the plaintiff hath declared. *Ideo conſideratum* "*eſt*, that he ſhall recover his damage aforeſaid, &c."

The error aſſigned in law was, FIRST, That judgment is given for the plaintiff, where it ought to have been given for the defendant.

SECONDLY, Becauſe the judgment is for the ejectment *de integris tenementis*, where it ought to have been but of the moiety.

ATHOE, *Serjeant*, ſaid, that for the firſt point he would not inſiſt whether it were error or no; for he conceived the ſecond to be a manifeſt error, becauſe the plaintiff had no colour to have an ejectment, but for a moiety only. And the judgment was given for the whole, and entire damages aſſeſſed by the jury. Whereupon *Curia adviſare vult.*

If a huſband ſeiſed of a copyhold in right of his wife make a leaſe not warranted by the cuſtom, it is a forfeiture of the eſtate during the life of the huſband only. Bendl. 147. 1. Roll. Ab. 509. 2. Roll. Rep. 344. 361. 372. 8. Co. 44. Cro. Eliz. 149. 301. Godb. 345. Palm. 383. Gilb. Ten. 243. 4. Co. 27. a. 2. Com. Dig. 525. 3. Bac. Ab. 307.

For the matter in law the caſe is, A copyholder in fee takes huſband, who makes a leaſe for years, which by the cuſtom of the manor is a forfeiture. The huſband dieth: Whether this forfeiture ſhall bind the wife and her heirs after her huſband's death? And IT WAS ADJUDGED it ſhould not bind; but that the wife ſhall have it again after her huſband's death, notwithſtanding the forfeiture.

Case 5.

Flight *against* Crasden.

Assumpsit will lie upon a mutual promise, *viz.* that if the obligor will pay the money on the day, the obligee will deliver up the bond.

Hutton, 76. Cro. Eliz. 194. 439. 1. Roll. Ab. 23. 27. 1. Vent. 258. 1. Com. Dig. 141. 1. Term Rep. 479. 483.

ASSUMPSIT. Whereas the plaintiff was obliged to the defendant in an obligation of sixty pounds to pay thirty the 9th day of *May* 1624; that the defendant, the said 9th of *May*, in consideration the plaintiff would pay to him the said thirty pounds upon the said 9th of *May*, promised to deliver the said bond to be cancelled: and alledgeth in fact, that he paid the said thirty pounds to the defendant according to his promise, and that the defendant had not delivered him the said bond to be cancelled, but refused, and had caused him to be arrested thereupon, to his damage, &c.

The defendant, *protestando* that he made not any such promise, *pro placito dicit, quod non solvit, &c.* whereupon they were at issue; and it was found for the plaintiff.

GWYN, *Serjeant*, moved in arrest of judgment, that this is not any consideration to charge the defendant: for he received but his money at that instant time; and consideration ought always to be matter of profit and benefit to him to whom it is done, by reason of the charge or trouble of him who doth it; otherwise it is not a sufficient ground for a promise, and so the action lies not: and for proof hereof he cited 9 *Edw.* 4. *pl.* 19.

But RICHARDSON, *Serjeant*, *for the plaintiff*, shewed, that it is consideration sufficient to have it paid without suit or trouble; for peradventure the non-payment at that time would be more prejudicial to him than the forfeiture of the bond would be of advantage, if he should be forced to sue for it. And he promised to do nothing but that which in honesty and equity he ought to do, *viz.* to deliver up the bond upon payment of the money; which promise is binding.

ALL THE COURT were of that opinion, for the reasons before alledged.—And HOBART said, if he had promised in this case, that if he would pay the money in the morning of the said day, he would give him five pounds, it had been a good promise, because the money was paid before sun-set (the time when the law appoints it to be paid).—And it was adjudged for the plaintiff, HARVEY and YELVERTON *absentibus* (*a*).

(*a*) *Sed vide* Cowp. 128.

Case 6.

Caroon's Case.

An *alien* may be executor and administrator of chattels real as well as personal; and if he sue *in autre droit*, his *alienage* cannot be pleaded in *abatement*.

Co. Lit. 2. b. note (8) 128. b. 129. b. 1. Salk. 2. 1. Skinner, 370. Dig. 235. 262.

SIR UPWELL CAROON, an alien born, and not made denizen, being agent here for the *States* of the *Low Countries*, died intestate; and contestation was made to whom administration should be committed.

The judge of the prerogative offered to commit it to three of his brother's and sister's children, who were aliens born, and lived in the arch-duchess' country.

But one who was grandchild of his sister, born in *England* and inhabiting here, endeavouring to obtain it, moved, that of right it appertained to him, being a denizen, because the estate consisted in

1. Brownl. 42. 1. Salk. 46. 4. Mod. 285. 9. Edw. 4. pl. 7. Cro. Eliz. 683. Moor, 431. Andrews, 76. Strange, 1082. Fort. 221. Ld. Raym. 282. Dougl. 641. 650. 1. Com. Dig. 300. 302. 1. Bac. Abr. 84. 2. Bac. Ab. 375. 3. Bac. Abr. 696. Dougl. 643. to 650.

leases

leaſes for years of lands, and perſonal eſtate in debts; and that aliens may not have leaſes for years, although they may have perſonal things, and therefore prayed a prohibition.—*Sed Curia adviſare vult.* CAROON'S CASE.

Afterwards, in *Michaelmas Term*, being again moved, it was reſolved by the whole Court, that no prohibition was grantable; for an alien may be adminiſtrator, and have adminiſtration of leaſes as well as of perſonal things, becauſe he hath them in another's right, and not to his own uſe; and he may be adminiſtrator, as well as a perſon outlawed or attainted may be an executor: and this Court hath no authority about committing adminiſtrations, &c. In the caſe of *Beck v. Philipps* (*a*), debt was brought by an adminiſtrator, and the defendant pleaded that the plaintiff was an *alien née*; but it was adjudged *quòd reſpondra ouſter.*

(*a*) In Eaſter Term, 43. Eliz. Roll 1704.

Doctor Brikenden's Caſe. CASE 7.

A PROHIBITION was prayed, Becauſe, upon proſecution in the ſpiritual court for tithes, ſentence was againſt the defendant, and an appeal ſued thereupon; and *Dr. Brikenden* made thereby a party as promoter of the ſuit, who was not any party thereto.

Coſts awarded by a ſpiritual court before a general pardon, though not taxed till afterward, are not taken away by the pardon.

5. Co. 51. b. Poſt. 47. 199. 2. Roll. Ab. 304. 2. Hawk. P. C. 556.

The firſt ſentence was confirmed in *November* 1623, and coſts were then awarded to *Dr. Brikenden*, but not taxed until *Hilary Term* 1623. Between the time of awarding the coſts and of taxing the ſame came the pardon, which pardons all offences before *December* 1623, whereby this offence, and the coſts taxed thereupon, as was pretended, although they were awarded in the ſpiritual court before the ſaid pardon, were alſo pardoned; and becauſe it was not there allowed, a prohibition was prayed.

But THE COURT denied it; for thoſe coſts being awarded to the party before the pardon, although they were taxed afterwards, are not taken away by that pardon.

Marſhall's Caſe. CASE 8.

EJECTMENT. After imparlance the defendant pleaded "*ancient demeſne*:" and it was thereupon demurred; for being after imparlance it came too late.—But THE COURT doubted thereof, becauſe ſuch land is not impleadable at the common law, and therefore it came time enough when he had not pleaded any other plea. *Sed Curia adviſare vult.*

Qu. If a plea to the juriſdiction, as "*ancient demeſne*," is not too late after imparlance?

5. Co. 105. 1. Vent. 236. Latch. 83. Dyer, 210. 1. Com. Dig. 71. Stra. 520. 4. Bac. Ab. 28. Tidd's Practice, 240. 1. Term Rep. 278. S. C. Yelv. 112. 3. Bac. Ab. 273.

Trinity Term,

1. Car. 1. In the Common Pleas.

Sir Henry Hobart, *Knt. Chief Juſtice.*
Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Henry Yelverton, *Knt.*
Sir Thomas Coventry, *Knt. Attorney General.*
Sir Robert Heath, *Knt. Solicitor General.*

Lionell Farrington's Caſe.

CASE 1.

An action qui tam, and all proceedings thereon, ſhall ſtand unabated, notwithſtanding the demiſe of the king; for it is a civil ſuit, and within the proviſions of 1. Edw. 6. c. 7.

Moor, 748.
1. And. 45.
7. Co. 31. a.
Dyer, 165.
Hutton, 82.
3. Lev. 207. 398.
Lut. 196.
Sav. 56.
Cro. Eliz. 138.
Hard. 161.
Stra. 43. 782.
1. Com. Dig. 229.
Cowp. 389.

DEBT was brought upon the 23. *Eliz.* c. 1. ſ. 5. againſt *Thomas Prince* and his wife, *ad reſpondendum* one hundred and twenty pounds for the recuſancy of his wife, and abſence from church for eleven months, *viz.* from the 23d of *September* 21. *Jac.* 1. to the day of the writ: *per quod actio accrevit eidem domino regi et* LIONELLO FARRINGTON; *qui tam, &c. ad habendum* the ſaid one hundred and twenty pounds.

Upon this declaration the defendant demurs; "*pro eâ quòd declaratio ipſius* LIONELLI *minus ſufficiens in lege exiſtit ad ij ſum* LIONELLUM, *qui tam, &c. verſus ipſum* THOMAM *manutenendum, &c. unde petit judicium. Et quòd prædictus* LIONELLUS, *qui tam, &c. ab actione ſuâ prædictâ verſus eos habendum præcludatur. Et prædictus* LIONELLUS, *qui tam, &c. ex quo ipſe ſufficientem materiam in lege, ad actionem prædictam verſus eos manutenendum ſuperius declaravit, &c.*" And they joined in demurrer, which was entered in *Hilary Term.*

KING JAMES departed this life in the vacation following; and it was moved in *Eaſter Term*, Whether the original writ, declaration, pleading, and demurrer upon that action, being brought by the informer for the king and himſelf, ſhould be abated by the demiſe of the king, as an original brought by two, where by the death of either the writ ſhall abate; or as writs original brought by the king in his own name only, as it is in 7. *Co.* 30.? or, Whether the writ and declaration only ſhall ſtand and not be diſcontinued, as it is reſolved in the ſaid caſe? or, Whether the writ and declaration and all proceedings thereupon ſhall ſtand by the ſtatute of 1. *Edw.* 6. c. 2. as it ſhall do in writs of debt betwixt common perſons (*a*)? And becauſe no precedent had been produced in ſuch caſes, and many precedents were, that thoſe only ſhould ſtand; but that all demurrers and pleadings to informations were determined.

THE COURT adviſed until this Term, and ordered, that precedents ſhould be ſearched to know what had been done in actions of debt upon penal ſtatutes, brought by information for the king and party.

(*a*) By 1. Ann. c. 8. no writ, plea, proceſs, or other proceeding on any indictment or information, or for any debt or account to her majeſty or ſucceſſors, ſhall be diſcontinued and null without day by the demiſe of the crown.

And

And now being moved again, and informing that there could not any precedents be found, and that ſuch writs upon that ſtatute had not been frequent, but of late, THE COURT reſolved, that this writ and declaration, with all the proceedings thereupon, ſhould ſtand; for it is merely the ſuit of the party, and within the ſtatute of *Edward* the ſixth, which ſhall not be diſcontinued or abated: for although the writ be, "*quòd reddat domino regi et informatori*," yet it is preſumed for himſelf, he being as the original party only; for the ſtatute appoints, that no protection or wager of law ſhall be therein. And the pleading upon this writ ſhews as much, *viz.* "that the plaintiff *Farrington* ſhall maintain his action," and that "the declaration is not ſufficient to compel him to anſwer "to the informer," never mentioning *the king*. And the replication and joining in demurrer is only by the informer, *viz.* that "it "is not ſufficient to bar him of his action." Whereupon THEY ALL RESOLVED, that not only the writ and declaration, but all pleadings thereupon and the demurrer ſhould ſtand. 7. *Rep.* 30. *Dyer*, 125. 6. *Edw.* 6. *Fitzherbert*, "*Nonſuit*," 13.

LIONELL FARRINGTON'S CASE.

3. Lev. 395. 2. Hawk. P. C. 393.

George Venables' Caſe.

CASE 2.

THIS Term A WRIT OF PRIVILEGE was ſigned by all the juſtices of the common pleas for *George Venables*, a clerk under the *cuſtos brevium*, to free him from being a ſoldier, reciting, That it is the cuſtom and privilege of the court time whereof, &c. that neither the attornies nor clerks of the court ſhall be preſſed for ſoldiers, nor elected to any other office *ſine voluntate ſuâ*, but ought to attend the ſervice of the court. *Vide Lord Coke's Entries*, 436. where the like writ of privilege was granted to a clerk of the king's bench to diſcharge him from being preſſed for a ſoldier.

The *clerks* and *attornies* of the king's bench and common pleas are entitled to a writ of privilege to protect them from being impreſſed.

Noy, 113. 1. Saund. 67.

Off. Br. 164. 174. 176. Barnes, 37 42. Ray. 173. Strange, 1143. Poſt. 585. 1. 2. Bl. Rep. 1125. 4. Burr. 2111. 1. Com. Dig. 450, 451. Cowp. 512. 518. 1. Bl. Rep. 636.

Memorandum.

CASE 3.

UPON *Monday* the twentieth of *June* this Term, being the firſt day of *Octabis Trinitatis*, A WRIT OF ADJOURNMENT was delivered to the juſtices to adjourn the two returns of *Octabis Trinitatis*, *et Quindena Trinitatis*, *uſque tres ſeptimanas poſt Trinitat.* which was *die Lunæ* the laſt week; and that all pleas and proceſs and all returns of ſheriffs ſhould be adjourned to that return.

Two returns of *Trinity Term* adjourned by a writ of proclamation on account of the plague.

Dyer, 225. Cro. Jac. 16. 1. Bl. Rep. 530. 1. Com. Dig. 232.

The writ was dated 18th *June*, which was *die Sabbati* in the firſt return; and mentions, that "WHEREAS the peſtilence much in-"creaſed in *London*, the ſuburbs and parts of *Weſtminſter*, and if "the ſubjects of all parts of the realm ſhould reſort hither for law "cauſes, it would be very dangerous to increaſe the ſickneſs, to the "peril of the king's perſon, and of foreign ſtates reſorting to him; "THEREFORE the king, by advice of his council and judges, &c. "had appointed, &c."

Proclamations thereupon iſſued, bearing date the 18th *June*, 1. *Car.* 1. ſignifying the king's pleaſure to adjourn theſe two returns until the laſt return (*a*); and that the laſt return ſhould be held only for continuance of cauſes and proceſs, and for the joining of

(*a*) 1. And. 279. Jones, 84.

MEMORANDUM. iſſues; but that no proceedings ſhould be upon demurrers or ſpecial verdicts, nor any judicial hearings in any of the courts of chancery, ſtar-chamber, court of wards, court of requeſts, dutchy or exchequer chambers: and that no perſons ſhould be compelled to appear in perſon, but by attorney; with A PROVISO, that all accomptants and parties appointed to pay money into the exchequer ſhould hold their days in the exchequer to account.

And thereupon the juſtices of the king's bench, common pleas, and barons of the exchequer, ſat in their ſeveral courts, and heard divers motions in their reſpective courts (but none upon any demurrers or ſpecial verdicts), and ſo continued until eleven of the clock that morning: and then, in the common pleas, THE WRIT
Cro. Jac. 231—446. OF ADJOURNMENT, enſealed and incloſed in wax with the great patent ſeal, was opened, and three proclamations made to hear the writ of adjournment read; which being done, the cryer rehearſed the effect of the writ of adjournment in *Engliſh*, that all pleas, proceſs, and appearances thereunto, were adjourned until *tres Trinitatis*.

Danv. Ab. 244. Dyer, 225. b. And then THE COURT roſe without doing aught elſe: nor were there any eſſoigns or proceedings made upon that return. And upon *Monday* in *tres ſeptimanas Trinitatis* (being the day of eſſoigns of the ſaid return) the day following, and the laſt day of the Term, the court ſat again and heard all motions; but none upon demurrers or ſpecial verdicts, by reaſon of the proclamation aforeſaid: and all recoveries, fines, and motions for proceeding to trials, were as if it had been in full Term. *Vide Trin.* 4. *Edw.* 4. *pl.* 20. *Trin.* 11. *Edw.* 4. *pl.* 37. *Trin.* 21. *Edw.* 4. *pl.* 37. *Mich.* 5. & 6. *Elizab. Dyer*, 225.

Michaelmas

Michaelmas Term,

1. Car. 1. In the Common Pleas,

AT READING.

Sir Henry Hobart, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Memorandum.

CASE 1.

THE KING, by proclamation three weeks before the beginning of *Michaelmas Term*, in reſpect the ſickneſs continued ſo great at *London* and the parts thereto adjoining, ſignified his pleaſure, That the ſaid Term ſhould be adjourned from *Octabis Michaelis* until *Menſe Michaelis*; and on the firſt day of *Octabis Michaelis* JUSTICE YELVERTON, *Puiſne Judge*, had a writ to adjourn accordingly, it being his turn to keep the *eſſoigns*.

The courts of *Weſtminſter Hall* adjourned to *Reading* in the county of *Berks*.

The like writs of adjournment were directed to the juſtices of the king's bench and barons of the exchequer; and the puiſne judge and baron of every court came to *Weſtminſter* the firſt day of the return, being the day of *eſſoigns*, and read the writ of adjournment of their courts only, and did nothing elſe.

Poſt. 17.

At *Menſe Michaelis* the juſtices of every court had other writs directed to them to adjourn, until *Craſtino Animarum*, to READING; and the king, by proclamation bearing date the 11th of *October*, ſignified his pleaſure, that his courts of chancery, requeſts, wards, ſtar-chamber, dutchy, and receipt of the exchequer, ſhould be there held.

Cro. Jac. 17. Jones, 84. Dyer, 225. b.

Accordingly, the firſt day of *Menſe Michaelis*, which was the day of *eſſoigns*, the puiſne judges of all the courts of the king's bench, common pleas, and exchequer, came to *Weſtminſter* and read the ſaid writs, and adjourned the Term unto *Reading*.

Memorandum.

CASE 2.

IN the mean time, *viz.* the 27th of *October*, JOHN WILLIAMS, biſhop of *Lincoln*, Keeper of the Great Seal, was diſcharged of his place; and upon the 30th of *October*, being *Sunday*, SIR THOMAS COVENTRY, of the *Inner Temple*, knight, the King's Attorney, was made Keeper of THE GREAT SEAL. The ſame day SIR ROBERT HEATH, the King's Solicitor, was made Attorney-General; and RICHARD SHELDON made Solicitor, and knighted; both being of the *Inner Temple*.

Lord Keeper Williams diſcharged, and ſucceeded by *Sir T. Coventry*. *Heath* and *Sheldon* promoted.

Memo-

CASE 3.

Memorandum.

The day of nominating sheriffs may be adjourned by the king to a time after the morrow of *All Souls*. Post. 595.

Dyer, 215. 2. Inst. 559. 2. Com. Dig. 581. 1. Bl. Com. 340. 4. Bac. Ab. 433.

UPON the morrow of *All Souls*, being *Thursday*, and the day appointed by the statute of 9. *Edw.* 2. c. 2. and 14. *Edw.* 3. c. 7. (*a*) 23. *Hen.* 6. c. 8. and 21. *Hen.* 8. c. 20. for the chancellor, treasurer, and judges to meet in the *exchequer* to nominate persons to be made sheriffs for all counties, it was much doubted whether all the justices were to come thither, it being the day of *essoigns*, and to sit in court; or whether they might stay until *quarto die post*, and that one of them only should come the first day to keep the *essoigns*. And by reason of the shortness of the time from the change of the lord-keeper, it was appointed by the king, that the day of the *billing of sheriffs* should be deferred from the usual day; and that all the justices, except the three puisne justices, who were to keep the *essoigns*, should not come until *Saturday*; and that no court should sit until *Monday*: for they held, that the *quarto die post* of the return is properly the day for sitting, and not before, although it be after adjournment; as it is, the Term being without adjournment.

The *puisne judge* of each court shall sit to take *essoigns* on the first return; but the *full court* not till the *quarto die post*.—Post. 102. 200. Dyer, 225. b. Cro. Jac. 129. Dan. Ab. 244. 3. Bl. Com. 278. 1. Term Rep. 16. 3. Term Rep. 185.

(*a*) By 24. Geo. 2. c. 48. s. 12. which, with the statute 16. Car. 1. c. 6. abbreviates *Michaelmas* Term, it is recited, That whereas by the abbreviation of *Michaelmas* Term the morrow of *All Souls* will not be in full Term, and thereby will prove inconvenient for the purpose of ordaining sheriffs pursuant to 14. Edw. 3. c. 7. and enacted, that the officers and persons who ought to assemble at the exchequer yearly on the *morrow of All Souls* for the ordaining and nominating sheriffs, shall not assemble on that day, but on the *morrow of St. Martin*, at the exchequer, in like manner, and for the same intent and purpose.

CASE 4.

Memorandum.

A prisoner in execution shall not have a *habeas corpus* returnable at a distant period in order to afford him an opportunity of going at large with his keeper in the intermediate time; and to suffer a prisoner to go at large under colour of such a writ, is an escape.

Ld. Raym. 241. 2. Lev. 109. Cro. Eliz. 5. 3 Co. 44. a. 1. Roll. 803. Hob. 202. Post. 466. Moor, 257. 299. 1. Mod. 116. Stra. 420. 501. Hard. 476. Barnes, 222. 386. 3. Com. Dig. 182. 2. Show. 299. And see 8. & 9. *Will.* 3. c. 26. 2. Bl. Rep. 1043. 2. Bac. Ab. 238, 239. 2. Term Rep. 5. 146.

UPON the *Tuesday* following all the justices were assembled at THE LORD KEEPER's house, to be conferred withal, Whether it stood with law, or was convenient, to grant a *habeas corpus* to the Warden of the Fleet, or to the Marshal, by their keepers or others, to have any prisoner who was in execution to appear at a day certain the next Term in court; and, under colour thereof, that the said prisoner should go at large with his keeper in the vacation or Term time, and return to prison at the time appointed?

And all the JUSTICES AND BARONS agreed, That it was not allowable or justifiable in law; but *The Warden* and *The Marshal* have only a convenient time to bring the prisoner accordingly into court, and to carry him back again to prison; and if they suffer him to go at large for any longer time than is convenient (and the law shall adjudge what is convenient), it is an escape in him.

And THE LORD KEEPER and ALL THE JUDGES agreed, That they would not grant any *habeas corpus* returnable for a longer day than the necessity of the case required; and not otherwise than stands with law, as in debt, trespass, and other actions, where bail is to be put in to answer to suits. And they admonished the Warden of the Fleet, that under colour of such writs he should not suffer prisoners to go at large, upon peril to be charged with escapes.

Sir

Sir John Iſham *againſt* York.

CASE 5.

ACTION FOR WORDS. Whereas the plaintiff is and hath been juſtice of the peace of the county of *Northampton* for ten years, that the defendant, to ſcandalize him in his place, and to cauſe him to be amoved out of commiſſion, ſpake theſe words: "I have been often with *Sir John Iſham* for juſtice, but could never "get any at his hand but injuſtice."

To ſay of a juſtice of peace, "I have been "often with "*him* for juſ- "tice, but "could never "get any at his "hand, but "injuſtice," is actionable. Poſt. 223.

After verdict upon not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment, That theſe words are not actionable; for it is not ſaid that he offered him injuſtice in his office of juſtice, nor that he complained to him for juſtice as juſtice of the peace, and he denied it, but generally, that he could not have juſtice; and it might be that he complained to him for matters betwixt party and party for private offences, wherein he could not have redreſs as from a juſtice of peace.

Moor, 141. 1. Roll. Ab. 571. 1. Vent. 50. 1. Mod. 23. 3. Mod. 71. 1. Sid. 432. Cro. Eliz. 358. Cro. Jac. 56. 90. Heil. 161. 1. Com. Dig. 181. Stra. 617. 1168. Fort. 206. 2. Ld. Ray. 1369. Cowp. 276.

CREW, *Serjeant*, of counſel with the plaintiff, afterwards at another day ſhewed, That the plaintiff declaring that he was a juſtice of peace, and that the defendant intending to ſcandalize him in his place, and cauſe him to be removed, had ſpoken, &c. and being found guilty thereof, it muſt be intended thoſe words were ſpoken upon that occaſion and of him as a *juſtice of peace*, and not of him as a *private perſon*, or for any private occaſion; and compared it to the Caſe of *Stuckley v. Bulhead*, 4. *Co.* 16. *a.*

And of the ſame opinion was ALL THE COURT; and thereupon judgment was given for the plaintiff.

Smith *againſt* Craſhaw, Ward, and Ford.

CASE 6.

In the King's Bench.

THE PLAINTIFF brought an action on the caſe againſt the now defendants, For that they had falſely accuſed him of treaſon at *D.* in the county of *Norfolk*, and had cauſed him at the ſaid town to be apprehended by the conſtable, and brought before a juſtice of peace, who committed him to *Norwich* caſtle; and that at the aſſizes there they falſely and maliciouſly had exhibited a bill of indictment of treaſon before the juſtices of aſſize, and falſely and maliciouſly affirmed it to be true, by reaſon whereof he was detained in *Norwich* priſon until diſcharged by proclamation.

An action on the caſe in the nature of *conſpiracy* will lie for falſely and maliciouſly cauſing a man to be apprehended, impriſoned, and indicted for *treaſon*. Poſt. 553. Latch. 79. 1. Roll. Ab. 112. Jones, 93. Bendloe, 13. 152. 2. Bulſt. 271. 4. Co. 16. 9. Co. 55. F. N. B. 114. 2. Inſt. 562. 638. Co. P. C. 143. 222. Cro. Jac. 358. Cro. Eliz. 70. 134. 4. Bl. Com. 136. C. 347. Cowp.

Upon not guilty pleaded, and verdict for the plaintiff, in *Michaelmas* Term, 20. *Jac.* 1. it was moved in the king's bench in arreſt of judgment upon exceptions then ſhewn, and judgment thereupon, *quòd querens nihil capiat, &c.*

It was there revived by a new action on the caſe, in nature of a conſpiracy, as formerly. The defendants pleaded ſpecial matter of excuſe, and traverſed the malicious accuſ tion; which was found againſt them, and two hundred and forty pounds damages given.

It was moved in arreſt of judgment, That this action lies not, becauſe there never was any precedent ſeen that any ſuch action or writ of conſpiracy for ſuch cauſe was brought; nor is it ever mentioned in any of our books (for the miſchief which might enſue to the ſtate if men ſhould be deterred from diſcovering treaſons).

Ld. Ray. 378. 1169. 1. Stra. 193. 4 Burr. 1973. 1. Com. Dig. 157. 1. Hawk. P. 37. Dougl. 215. 1. Term Rep. 235.

But

SMITH *againſt* CRASHAW and Others.

But ALL THE JUSTICES, after divers motions in ſeveral Terms, and long conſideration of this Caſe (being the firſt precedent which can be ſhewn) RESOLVED, That the action well lies; for it being alledged to be falſely and maliciouſly and by conſpiracy exhibited, and the defendants by the verdict found to have falſely and maliciouſly exhibited it, it is not reaſon it ſhould be diſpuniſhable; for then no perſon would be ſafe, if ſuch practices ſhould be ſuffered, and the parties endangered thereby ſhould have no remedy: and therefore they adjudged it for the plaintiff.

NOTE, The ſtatute of 33. *Edw.* 1. c. 2. and the writ of conſpiracy, do not in particular mention for what cauſe, but generally declare, "If any falſely and maliciouſly conſpire to procure any "to be indicted." And here in this Caſe, it being ſet forth, that they falſely and maliciouſly accuſed him of treaſon where they knew it to be falſe, and falſely and maliciouſly had conſpired to cauſe him to be indicted, and falſely and maliciouſly exhibited an indictment, and had ſworn the matter thereof to be true, whereas it was falſe, and they knew it to be falſe; and it is traverſed that they did not falſely and maliciouſly accuſe him and exhibit the indictment, which alſo is found againſt the defendants (ſo the ſubſtance of the declaration is found againſt them); it is good cauſe of action, and the defendants are not to be excuſed of ſuch falſities, nor the law will not ſuffer the defendants to go unpuniſhed. Wherefore, by the opinion of all the juſtices in the king's bench, who delivered their opinions *ſeriatim*, *viz.* SIR RANDOLPH CREW, *Chief Juſtice*, DODERIDGE, JONES, and WHITLOCK), it was adjudged for the plaintiff.

See 8. Hen. 6. c. 10. and 18. Hen. 6. c. 12.

CASE 7.

Quære, If the ſpiritual court can excommunicate a huſband for refuſing to pay for tranſmitting a record againſt himſelf in a ſuit by his wife?

2. Roll. Ab. 301. Ray. 55. 123.

Green's Caſe.

GREEN prayed a prohibition to the eccleſiaſtical court at *Saliſbury*, Becauſe his wife ſued him there to be ſeparated from him *propter ſævitiam*.

Sentence was there given for the huſband againſt the wife, and he enforced to pay all the coſts for his wife. Afterward ſhe appealed; and becauſe the huſband would not anſwer the appeal againſt himſelf, and pay for the tranſmitting of the record, he was therefore excommunicated; and now prayed a prohibition.

THE COURT conceived the Caſe to be very hard, that he ſhould be enforced to ſpend his money againſt himſelf; but becauſe it was alledged that the courſe was ſo in the ſpiritual court, they would adviſe until the next Term; and ordered to ſtay their proceedings in the mean time.

CASE 8.

A grant by a biſhop of an office with an ancient fee for life is good, though the rent be reſerved *half yearly* where it was before by *the year*; be paid. Poſt. Co. Lit. 44. b. Rep. 66.

Cook *againſt* Younger.

ACTION UPON THE CASE. Whereas the office of the under-ſtewardſhip of the courts of the manor of *Keyſham*, and other the manors of the biſhop of *Glouceſter*, was anciently an office grantable for term of life, with the fee of three pounds ſix ſhillings and eight-pence by the year; and whereas a former biſhop of *Glouceſter* had granted to the plaintiff the ſaid office for life, with the fee of three pounds ſix ſhillings and eight-pence payable annually

nor need it ſhew for *whoſe life* it was made, or the particular days on which *the fee* is to 47. 259. Bridg. 30. 5. Co. 5. b. 6 Co. 38. a. Cro. Jac. 76. Cro. Eliz. 636. note (1). Moor, 759. 3. Bac. Ab. 723. 3. Com. Dig. 253. Dougl. 573. 3. Term

at

Cook *againſt* Younger.

at the two Feaſts of the year, *viz.* at the Annunciation of the Virgin *Mary* and at *St. Michael* the Archangel, iſſuing out of the ſaid manors; and that the ſaid biſhop died, and that the plaintiff was ready to keep the courts of the now biſhop; but the defendant, pretending a grant made to him from the ſaid biſhop's ſucceſſor, diſturbed him from keeping of them.

After not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment, That this grant was void to bind the ſucceſſor of the biſhop:

FIRST, Becauſe the preſcription is, that the ſaid office is grantable with a fee of three pounds ſix ſhillings and eight-pence by the year, and here the payment is appointed to be at two Feaſts of the year, and ſo not warranted by the ſtatute.

SECONDLY, Becauſe the preſcription is, that the office is grantable for life, and he doth not ſhew for whoſe life, and it may be for the life of the biſhop who was grantor.

But none of theſe exceptions were allowed: and to confirm their opinions, the Caſe of the Dean and Chapter of *Worceſter*, in 6. *Co.* 37, 38. *a.* was vouched, that the days of payment are not material where no leſs than the ancient rent is reſerved yearly; and that the preſcription being to grant for life, ſhall be intended to be for the life of the grantee. Poſt. 283.

THIRDLY, It was objected, That here was a miſ-trial, the diſturbance being alledged to be in the court at *Keyſham*, and ſo in other manors where no vills are, and the trial being *per vicinetum* of the manors, whereas it ought to be of the vills wherein the manors are, it therefore was not good, nor aided by the 21. *Jac.* 1. c. 13.

Venue from the *manors* is good, if ſome are alledged within the proper vills. Poſt. 162. 312. 480. Co. *Lit.* 125. *b.* 6. Co. 14. b. 1. Bac. Abr. 93. 3. Bac. Abr. 273. 3. Term Rep. 387.

But THE COURT held, that in regard ſome of the ſaid manors are alledged to be within thoſe vills, and the *venue* being of the manors, it ſhall be good by the ſtatute (*a*) although it were of fewer or more places than it ought to be; and therefore judgment was given for the plaintiff.

(*a*) *Vide* 1. Jac. 1. c. 23. 16. & 17. Car. 2. c. 8. 4. & 5. Ann. c. 16. and 14. Geo. 2. c. 18.

Bryan *againſt* Wetherhead.

Trinity Term, 20. *Jac.* 1. *Roll* 602.

CASE 9.

EJECTMENT. Upon not guilty pleaded, a ſpecial verdict was found, That *John Bryan*, being ſeiſed in fee of a tenement called *Keyſhams* in *Aleſbury* (being copyhold of the manor of *Aleſbury*, whereof *Sir John Packington* was lord), erected a building by incroachment upon ſix feet of the waſte of the ſaid manor, and adjoined it to the ſhop of the ſaid houſe. Afterwards *Sir John Packington*, in 33. *Eliz.* by indenture demiſed to the ſaid *John Bryan* the ſaid ſix feet of waſte, ſo built upon and adjoining to the ſaid *Keyſhams*, for an hundred years; who in 1. *Jac.* 1. ſurrendered the ſaid tenement called *Keyſhams* to the uſe of *Mary Bryan* and her heirs, and in 5. *Jac.* 1. aſſigned all his term in the ſaid ſix feet of waſte ſo built upon to the ſaid *Mary Bryan*; who in 19. *Jac.* 1. by indenture let and demiſed to *William Wetherhead* the ſaid tene-

The grant of a houſe *cum appertinentiis* will not paſs an adjoining building not accounted parcel of the houſe, although held with it for thirty years. *Vide* poſt. 57. 169. Hutton, 35. Cro Eliz. 89. Keilway, 57. Co. Lit. 5. b. 2. Peere Wms. 763.

56. b. Cro. Jac. 121. 3. Com. Dig. 443. 2. Ch. Caſ. 27. 1. Lev. 131. 1. Sid. 241. 303. Bro. Ch. Caſ. 331. 1. Term Rep. 498. 502. 2. Term Rep. B. R. 498. Dougl. 763.

ment

BRYAN *againſt* WETHERHEAD.

ment called *Keyſhams*, *cum pertinentiis*, HABENDUM for ſeventy years, who aſſigned all his eſtate to the defendant. And afterward, in the ſaid nineteenth year of KING JAMES, the ſaid *Mary* died inteſtate; and adminiſtration was committed to the ſaid *Bryan*, who entered upon the ſaid ſix feet of waſte ſo built upon.

The queſtion was, Whether by theſe words, "the meſſuage "called KEYSHAMS, *cum appertinentiis*," this parcel of the ſhop, built as aforeſaid and annexed to the other ſhop, ſhould paſs or no?

And it was reſolved by ALL THE COURT, that it paſſed not; for being but a new *purpreſture*, and added to the ſhop of the tenement in 33. *Eliz.* and not being found that it had been uſed altogether with the houſe, or reputed or accepted as parcel thereof *ex vi termini*, nothing paſſed but what was parcel of the houſe from the time, &c. and the verdict hath found that it was not accounted as parcel of the houſe from any time after the purchaſe, and therefore it ſhall not paſs by the words "*cum pertinentiis*," eſpecially in a deed; but in a deviſe HOBART, *Chief Juſtice*, conceived peradventure it might paſs. And judgment was given for the plaintiff.

CASE 10.

Memorandum.

The laws againſt *recuſants* ordered to be put in execution, and all fines and forfeitures to be immediately employed in the public ſervice.

UPON the 13. *November*, this Term, SIR ROBERT HEATH, *Attorney-General*, came into court, and brought with him a commiſſion under the great ſeal, directed to the Lord Keeper, Lord Treaſurer, Chancellor of the Exchequer, the Juſtices of both Benches, and Barons of the Exchequer, the King's Attorney and Solicitor, COMMANDING them and all juſtices of peace in their limits, that they ſhould put in execution all the laws againſt recuſants, according to the petition of the commons in the laſt parliament, and the king's gracious pleaſure thereto ſignified; and further declared his pleaſure, that all ſums of money collected upon *eſtreats* ſhould be employed to the maintenance of his ordnance, his forts, and places of defence; and if any ſhould remain, it ſhould be employed for the ſupport of his navy, and ſhould not be put into his public treaſury, but by itſelf and for thoſe purpoſes; and that all leaſes of recuſants lands, or to their uſes, ſhould preſently be called in, as far as by the law they may be; and that none ſhall make ſuit to have them for recompence of any ſervice or other uſes, but ſhould be only employed to the uſes aforeſaid.

CASE 11.

Sir Francis Vincent *againſt* Leſney.

Treſpaſs will lie for killing A HAWK, without ſpecifying the ſpecies, or ſhewing that it was reclaimed; but in *trover* this muſt be ſhewn. Poſt. 89. 544. F. N. B. 86. Dyer, 306. 5. 283. Cro. Eliz.

TRESPASS: For that the defendant *accipitrem ipſius* FRANCISCI *percuſſit* with his ſtaff, upon which ſtroke the hawk died. The defendant pleaded not guilty; and it was found for the plaintiff, and damages aſſeſſed to ſix pounds. It was now moved in arreſt of judgment, that the declaration was not good, Becauſe he doth not ſhew what kind of hawk ſhe was, as goſhawk, lawner, &c.; for *accipiter* is the genus, and in the declaration he ought to ſhew the ſpecies thereof: and it is here too incertain; and compared it to *Plater's Caſe* (*a*), where in treſpaſs *quare clauſum fregit, et piſces cepit, &c.* the declaration was ill, becauſe he ſhewed not their

Co. 35. Lut. 1359. 1374. 2. Lev. 201. 3. Lev. 336. Raym. 16. Salk. 666. Hob. 126. 288. 545. Cro. Jac. 262. 463. Carth. 396.

(*a*) 5. Co. 34.

number

number and kind, as carps, tenches, &c.—*Sed non allocatur*; for here declaring *quòd accipitrem ipſius* FRANCISCI, *&c.* being but one, is ſufficient, and not like to *Plater's Caſe*, which was altogether incertain: and this Caſe is the ſtronger becauſe it is after verdict, which hath found him guilty of killing of the plaintiff's hawk.

Sir FRANCIS VINCENT *againſt* LESNEY.

SECONDLY, It was alledged, that the declaration was not good, Becauſe it is ſaid *accipitrem ipſius* FRANCISCI, and he doth not ſhew that ſhe was reclaimed; for a hawk is *feræ naturæ*, and, if not reclaimed, the plaintiff cannot have any property in her, nor can ſhe be ſaid to be *ipſius* FRANCISCI: and to confirm this *Spencer's Caſe* was cited (*a*).—But THE COURT held the declaration to be good enough, being in an action of *treſpaſs* for ſtriking and killing, &c. which he only may have who hath the poſſeſſion. And it differs from *Spencer's Caſe*; for there it was an action of *trover* and *converſion*, which lies not but of an hawk reclaimed, and which may be known by her vervels, bells, or by ſome other mark whereby notice can be taken of her owner. Whereupon it was adjudged for the plaintiff.

(*a*) Dyer, 306.

Andrew Farrer *againſt* Edward Engliſh.

CASE 12.

ASSUMPSIT. The plaintiff declares, Whereas in conſideration he was content and would accept the ſum of 12l. 10s. of the defendant in diſcharge of all reckonings and accompt betwixt the plaintiff and one *Thomas Engliſh* (the defendant's brother (*b*), who was then out of the county of *Norfolk*), and would ſeal and deliver a general acquittance to the uſe of the ſaid *Thomas*, as he ſhould be required; that the defendant aſſumed and promiſed to the plaintiff, he would procure the ſaid *Thomas Engliſh*, when he returned into *Norfolk*, to ſeal and deliver a general acquittance to the plaintiff: and he alledges in fact, that he accepted the ſaid 12l. 10s. in ſatisfaction of all reckonings; and that 1. *May*, 12. *Jac.* 1. at *Norwich*, he ſealed and delivered a general acquittance to *Edward Smith*, to the uſe of the ſaid *Thomas Engliſh*; and that upon the ſaid firſt day of *May*, 21. *Jac.* 1. the ſaid *Thomas Engliſh* returned into *Norfolk*; and that the defendant, *licèt requiſitus* by the plaintiff the ſaid 1ſt of *May*, hath not procured the aforeſaid *Thomas Engliſh* to make a general acquittance, *ſed hoc facere penitùs recuſavit*. The defendant pleaded *non aſſumpſit*; and found for the plaintiff.

A. received money of *B.* in diſcharge of *C.* and agrees to ſign a releaſe to the uſe of *C.*: the acceptance of the money is a good conſideration for a promiſe by *B.* to procure a mutual releaſe from *C.*; and after verdict a declaration on ſuch a promiſe is good, without ſhewing why *B.* paid or *A.* received the money, or that the releaſe *B.* ſealed was ſufficient; although it be averred to be delivered to a ſtranger, to the uſe of *C.*
Poſt. 77.

ATHOE, *Serjeant*, moved in arreſt of judgment, FIRST, Becauſe there is not any ſufficient conſideration why *Edward Engliſh* ſhould pay, or the other ſhould accept the ſaid 12l. 10s. in ſatisfaction, and ſhould make that promiſe.—*Sed non allocatur*; for he paying, and the other accepting, is ſufficient.

SECONDLY, Becauſe the conſideration is not ſufficiently alledged to be performed on the part of the plaintiff, being executory; for he alledgeth that he delivered a general acquittance, but ſhews not any whereby it may appear to the Court to be a ſufficient acquittance.

Cro. Eliz. 143. Cro. Jac. 570. Cowp. 450 1. TermRep. 62.

(*b*) But now, by 29. Car. 2. c. 3. no action ſhall be brought to charge a defendant on a ſpecial promiſe for the debt, default, or miſcarriage of another, unleſs ſome memorandum or note thereof be in writing, and ſigned by the party or by his authority.

THIRDLY,

FARRER against ENGLISH.

THIRDLY, Becauſe it was alledged to be delivered to *Edward Smith*, to the uſe of the ſaid *Thomas Engliſh*, who is a ſtranger, and peradventure could not or would not deliver it to *Thomas Engliſh*; and it was the intent of the parties to have it delivered to the party himſelf, or to *Edward Engliſh*, who was party to the promiſe.

And for theſe two laſt reaſons I held that the declaration was not good; but the LORD HOBART, HARVEY, and YELVERTON, conceived the declaration to be well enough; for the promiſe being general, "to ſeal and deliver a general acquittance to the uſe "of the ſaid *Thomas Engliſh*," is ſufficient, without alledging that he delivered a general acquittance according to the words of the promiſe; and the words being, "that he ſhall deliver to the "uſe, &c." and he alledging that he delivered to "*Edward* "*Smith*, to the uſe, &c." is alſo good enough, eſpecially after verdict upon *non aſſumpſit*, wherein he denied the promiſe, but not the performance of the conſideration. But LORD HOBART ſaid, if he had demurred upon the declaration becauſe he did not ſhew the ſaid acquittance, it might peradventure have been otherwiſe. And it was adjudged for the plaintiff.

CASE 13.

Whyte *againſt* Ryſden.

Treſpaſs and *trover* for abuſing and converting a horſe lent may be joined, and the *venue* laid where either the abuſe or converſion happened; and a verdict for intire damages is good.

1. Lutw. 98. Hobart, 187. 1. Bac. Abr. 31. 1. Term Rep. 32.

ACTION ON THE CASE. Whereas the plaintiff, at *London*, ſuch a day and year, *accommodâſſet* to the defendant a gelding *ad equitandum ab* LONDON *uſque civitatem* EXONIÆ, *et ibidem ſalvo redeliberandum* to the plaintiff; that the defendant, intending to deceive the plaintiff, rid upon the ſaid gelding from *London* to *Exon*, and from *Exon* to *London*, and by that riding ſo much abuſed the ſaid horſe that he became of little value; and notwithſtanding the plaintiff, at *Exon*, ſuch a day and year, required of him the redelivery of his ſaid gelding, he then refuſed and yet refuſeth to deliver him; and the ſame day, at *Exon* aforeſaid, converted the ſaid gelding to his own proper uſe, to his damage of TWENTY POUNDS.

The defendant pleaded not guilty; and found againſt him, and damages TEN POUNDS.

And it was now moved in arreſt of judgment by RICHARDSON, *Serjeant*, That this declaration was not good, to join together in one action the non-delivery of the horſe, according to the contract at *Exon*, and the converſion to his own uſe and the miſuſing him in the journey, which are all ſeveral cauſes of action.

Alſo it appeareth, that here was not a good trial, becauſe the bargain was at *London*, and the *tort* was alledged in riding back to *London* and the *miſ-uſer* in the journey: and the trial ought to have been at *London*, where the beginning of the contract was, and not at *Exon*, where the converſion was alledged.

Alſo, intire damages being given for all theſe *torts*, whereas the ſole cauſe of the action was, for that the gelding was not redelivered to him, it is not good.

But ALL THE COURT delivered their opinions *ſeriatim*, that the trial was good, and the damages well aſſeſſed:

FIRST, Becauſe the principal *tort* was, the not delivering upon requeſt, at *Exon*, according to the contract; and then when he denied

nied the re-delivery, and after converted him to his own uſe, the plaintiff may well have an action for both, and together (*a*). And although peradventure the defendant might have demurred, as LORD HOBART conceived, for the doubleneſs of the declaration (*b*), yet when he demurred not to it, but pleaded not guilty of the premiſes, and is found guilty, that makes the declaration good; and there is not any cauſe to ſtay the plaintiff's judgment.

SECONDLY, The trial is good *de vicineto de Exon*, becauſe the *tort* is ſuppoſed to be done there, and not at *London* (*c*).

And THIRDLY, The entire damages are well aſſeſſed for the *torts* alledged in the declaration. Whereupon it was adjudged for the plaintiff. *Vide* 7. *Co.* 1. *Bulmer's Caſe, and Poſt.* 186.

(*a*) 2. Lev. 101. 3. Lev. 99. Ray. 233. B. R. H. 129. 4. Bac. Abr. 11, 12. Salk. 10. 5. Mod. 91. 1. Wilſ. 248. (*c*) Hob. 188. Cro. Jac. 150. 7. Co. 2. 2. Wilſ. 319. 3. Wilſ. 4, 6. 1. Com. Dig. 122. 1. Lev. 114. 286. 3. Leon. 141. Strange, (*b*) Hob. 295. 2. Vent. 198. 222. 7, 6.

Caſtle *againſt* Hobbs.

CASE 14.

Trinity Term, 21. *Jac.* 1, *Roll* 2827.

EJECTMENT for lands in *Donnington*. Upon not guilty pleaded, a ſpecial verdict was found, that *William Read* being copyholder for life of certain lands, parcel of the manor of *Donnington*, paying fifteen ſhillings a-year to the lord of the manor; and that KING HENRY THE EIGHTH being ſeiſed in fee of this manor, *anno triceſſimo quinto regni ſui*, for the ſum of 854l. granted by his letters patent to *Richard Andrews* and *Peter Temple*, to them and their HEIRS, *inter alia*, "*omnia meſſuagia, terras, tenementa, redditus, reverſiones, ſervitia, et hereditamenta ſua, in* DONNINGTON *ſub-ſcriptâ*, VIZ. *totum illum annualem redditum quindecim ſolidorum et alia ſervitia exeuntia de terris* WILLIELMI READ (*et ſic diverſos alios redditus de* COPYHOLDERS), *ac totum illud meſſuagium et ſex virgatas terræ, in* DONNINGTON, *in tenurâ. J. D. habendum et tenendum, omnia prædicta meſſuagia, terras, tenementa, redditus, reverſiones, ſervitia, et hereditamenta, in* DONNINGTON *prædict.* to the ſaid *Richard Andrews* and *Peter Temple*, and their heirs:" and, Whether the ſaid patent was a good patent to convey the ſaid lands in the tenure of *William Read*, as aforeſaid? they prayed the diſcretion of the court; and if it were a good patent, they found for the defendant; and if not, they found for the plaintiff.

The king heirs ſeiſed in fee of the manor of *D.* grants "all his "meſſuages, "lands, rents, "reverſions, "and hereditaments in *D.* "hereafter "named, viz. "all that annual "rent of fifteen "ſhillings and "other ſervices "iſſuing out of "the land of "*A. B.*" who was a copyholder for life of lands parcel of the ſaid manor, at the rent of fifteen ſhillings a-year. This grant is not ſufficient to convey the land of the copyholder; for rents and ſeiſin only are mentioned.

2. Co. 16. b. 1. Ter. Rep. 560. 2. Ter. Rep. 498.

And thereupon it was argued by BRIDGEMAN, *for the plaintiff*, and by CREW, *for the defendant*.

BRIDGEMAN ſhewed that it cannot be a good patent to convey thoſe lands to *Andrews* and *Temple*, becauſe nothing is granted but the rent of fifteen ſhillings, and the ſervices of *William Read*, whereby is intended only the rents and ſervices which are due from him as a freeholder: and there is not any mention of lands to be granted, or that it is copyhold; and it ſhall not be ſaid to be a paſſing of the freehold of the copyholder; and therefore the king being deceived in his grant, nothing paſſed from him, and ſo the grant void.

SERJEANT THOMAS CREW ſhewed, that this patent was to paſs the rent of the copyholder, and freehold of the copyholder in fee, otherwiſe the patent ſhould be conſtrued void, wherein theſe words

CASTLE *against* HOBBS.

of the king's grant are particularized, *viz.* "*totum illud meſſuaglum* "*et ſex virgatas terræ, habendum meſſuagium, terras, &c.*" which implies that there is no miſpriſion in the patent: for thereby a meſſuage is granted, which cannot be unleſs the copyhold ſhould paſs; wherefore he conceived it ſhall paſs by conſtruction. And he moved, that if the patent were void, yet the plaintiff could not have judgment: for it is found, that KING HENRY THE EIGHTH was ſeiſed in fee, and made that patent; which if void, then the lands are again in the crown: and no title being found for the plaintiff, he cannot have any judgment.

But ALL THE COURT conceived it was a void patent, to convey the land of the copyholder to *Andrews* and *Temple*. For, FIRST, there is not any land granted, but the rents and ſervices of *William Read*, which is intended freehold; and there being none ſuch, the grant is merely void.

In ejectment, on a ſpecial verdict, if the jury ſubmit a particular point to the Court, the Court will intend every thing that is neceſſary to their giving judgment. Cro 141. 2. Term

And for the SECOND point, they all conceived, foraſmuch as the jury hath found that if it were a good patent, then for the defendant, if otherwiſe, they found for the plaintiff; it is intended, that there is a ſufficient title found for the plaintiff, unleſs by this patent it be defeated and avoided; ſo that if the jury be ſatisfied that the plaintiff hath any good right by any other manner of title, the Court ought not to doubt thereof, as it is reſolved in *Goodale's Caſe*, 5. *Co.* 97. And it was adjudged for the plaintiff.

Jac. 94. Poſt. 130. 392. 458. 5. Bac. Abr. 287. 1. Peere Wms. 190. 1. Term Rep. Rep. 666.

CASE 15.

Smith *againſt* Trinder *et Alios.*

Qu. Whether a leaſe made by a huſband of lands purchaſed by him to the uſe of himſelf and his wife and their heirs, ſhall, by 28. *Hen* 8. c. 28. be good againſt the wife after the death of her huſband?

5. Co. 9. Cro. Jac. 378. 1. Com. Dig. 561. 3. Bac. Abr. 320. 351. Cowp. 701. Dougl. 53.

EJECTMENT on a leaſe by ELIZABETH *counteſs of Berkſhire* of lands in *Water Eaton*.

Upon evidence to the jury at the bar, upon not guilty pleaded, the caſe was, That FRANCIS *earl of Berkſhire* purchaſed the land in queſtion to him and his wife and their heirs, in 41. *Eliz.* Afterward, in 16. *Jac.* 1. FRANCIS *earl of Berkſhire*, without his wife, let this land to SIR LAWRENCE TANFIELD, late Chief Baron of the exchequer, for threeſcore years, if *they* lived ſo long, rendering 220l. yearly rent at the two uſual feaſts. During the term *Francis* dies.

The queſtion was, Whether this leaſe ſhall bind the counteſs by the 32. *Hen.* 8. c. 28. becauſe ſhe was not made a party to the indenture?

YELVERTON, HARVEY, and MYSELF, upon the firſt motion and peruſal of the ſtatute, conceived it ſhould bind the counteſs. For the body of the act is, "That all leaſes made of land, which "the huſband is ſeiſed of in right of his wife, of inheritance, or "jointly with his wife by purchaſe, during the coverture, or be"fore, ſhall be good and effectual; and that the wife ſhall have "ſuch remedy for the rent as he that made the leaſe." But then the PROVISO is, "That ſuch leaſe ſhall be made of ſuch land, "whereof the inheritance is in the wife by indenture, in his and his "wife's name, and that *ſhe* ſhall ſeal, and that the reſervation ſhall "be to him and his wife, and to the heirs of the wife." And that clauſe ſhall extend to lands of intail of the wife's jointly by purchaſe during the coverture: for clearly, by the body of the act, it is a good leaſe, and not within the PROVISO; becauſe it is not the ſole

Michaelmas Term, 1. Car. 1. In C. B. 23

ſole inheritance of the wife: and the PROVISO extends only thereto; and it is out of the words and intent of the PROVISO: for the appointment thereby is, that the reſervation ſhall be to them and the heirs of the wife, which is not intended of a joint eſtate; but the reſervation ſhould be to both their heirs, ſo out of the intent and words of the PROVISO.

SMITH *againſt* TRINDER.

8. Co. 72. 5. Rep. 3. Powel on Powers, 553.

But LORD HOBART doubted thereof, wherefore it was directed to have it found ſpecially.

Upon the evidence it appeared, that anciently it was in leaſe, and occupied by two tenants; the one paid 60l. and the other 180l. and ſo for both 240l. yearly rent only: and now they are joined in one leaſe, and 280l. yearly reſerved, which is more by 40l. a-year than both the leaſes were before: and, Whether this be a good leaſe within the ſtatute, &c.? Whereupon a ſpecial verdict was found at the bar for both points, and afterwards it was ended by arbitrament.

Two farms uſually let to ſeparate tenants cannot be let by *one* leaſe to *one* tenant by 32. *Hen.* 8. c. 28. though a greater rent be reſerved.

5. Co. 4. a. & Cowp. 657.

119. b. 3. Keb. 380. Hardres, 325. 2. Vern. 531, 542. Prec. Ch. 257. 3. Bac. Ab. 363. Dougl. 570.

Hodgkinſon *againſt* Wood.

CASE 16.

Trinity Term, 19 *Jac.* 1. *Roll* 596.

EJECTMENT of a leaſe of *William Rogers* for lands in *W.* in the county of *Salop*.

If a man deviſe lands to *A.* and his heirs, and afterward leaſe ſuch lands to a ſtranger for years, to commence after his death, this is no revocation of the deviſe of the inheritance, except only during the term.—See the beginning of this Caſe, Cro. Jac. 690.

Upon not guilty pleaded, a ſpecial verdict was found, that *Thomas Rogers* was ſeiſed of the land in fee holden in ſoccage, and had iſſue by ſeveral VENTERS, *Francis* his eldeſt ſon, and *William* his ſecond ſon; and deviſed the land in queſtion to *Francis* his ſon for life, and after to the uſe of the heirs males of his body; and for default of ſuch iſſue, to the heirs males of *William Rogers*, and the heirs males of their bodies for ever; and for default of ſuch iſſue, to the uſe of his own right heirs: and afterwards maketh a leaſe for thirty years to *William* his ſon, to begin after his death, and dieth without other alteration of his will. *William* enters, and ſurrenders his leaſe of thirty years to *Francis*, who enters and lets that land to the defendant for years yet enduring; and afterward *Francis* dieth without iſſue, *William* enters as heir male of the body, and makes this leaſe to the plaintiff,

1. Roll Ab. 616. 1. Chan. Ca. 193. Gilb. Dev. 103. 2. Atkins, 71. Ca. Ch. 193. 1. Vern. 320. 2. Vern. 496. 3. Com. Dig. 185. Powel on Deviſes, 625. 103. Dougl 31.

Two queſtions were hereupon made:

FIRST, Whether this leaſe made to *William* for thirty years begin after the death of the deviſor, and ſo being to begin at the ſame time, that the deviſe of the inheritance ſhould take effect, be a countermand and revocation of that deviſe totally, or only *quoad* the term, and ſhall ſtand as to the inheritance (*a*)?—And as to that point ALL THE JUSTICES reſolved, it is not any revocation of the inheritance, but only for the term, for they both may ſtand together; and there ſhall not be any revocation unleſs it be expreſſed that the intent of the teſtator is changed, or that they cannot ſtand together. And here it may well ſtand with the inheritance: and for that point was cited the caſe of *Coke v. Bullock* (*b*), where one

(*a*) By 29. Car. 2. c. 3. No deviſe of lands, &c. ſhall be revocable but by ſome writing declaring the ſame, or by deſtroying the will; and no will of any perſonal eſtate ſhall be altered by word of mouth, unleſs put into writing in the teſtator's life, and executed as the act directs.

(*b*) Cro. Jac. 49. Godolph. 455.

Henskinson *against* Wood.

devised land to his sister in fee, and afterwards made a lease for sixty years unto her of the same lands, to begin after his decease, and delivers it to a stranger, to the use of his sister, which stranger did not deliver it unto her in the life of the testator, but afterwards, and she refused, and claimed the inheritance; it was resolved, because the devise and the lease made to one and the same person, beginning at the same time, cannot stand together in one and the same person, that it was a countermand of the devise. But there they all agreed, except WARBERTON, *Justice*, that if the lease had been made to any other than the devisee, they might stand together, and the lease should not have been a revocation of the will as to the inheritance, but only during the term. Another case was cited of *Coward v. Marshall* (*a*), where one devised lands by his will in writing to one of his younger sons in fee, and after by another clause in the same will devised the same lands to his wife for life, rendering annually to his said younger son twenty shillings. It was resolved that both these devises may stand, and that one is not a revocation of the other.—But YELVERTON, *Justice*, cited a case (*b*) adjudged in the king's bench, where one deviseth to one in fee, and afterwards make a feoffment to the use of his wife for life, remainder to his right heirs, so as it is *quasi* the ancient reversion; yet because he departed with all the estate, it shall be a revocation of the devise in all, and shall not be good without a new publication: wherefore THEY ALL RESOLVED, that in this case there is not any revocation of the inheritance; and appointed there should be no more arguments at the bar as to that point.

By a devise to the eldest son and the heirs male of his body; remainder to the heir male of the devisor and his heirs of his body; a son of the devisor by a second venter shall take the remainder. Co. Lit. 14. 22. 26. b. Co. 1. 104. a. 3. Cro. 97. 1. Rol. 841. 2. Mod. 207. Rep. 630. 3.

SECONDLY, Whether this devise to *Francis* and to the heirs males of his body, and for default of such issue to the heirs males of the devisor, and the heirs of their bodies, and for default of such issue to the right heirs of the devisor, be a limitation in tail to the heirs males of the body of the devisor, so that *William* may claim by this limitation an estate in tail as by purchase; or, whether it vested in *Francis* only, as being heir male to the devisor, and not by purchase; or if the inheritance in fee simple vested in him, for then his lease for years is executed out of the fee estate, and *William*, not claiming as right heir, is then bound by that lease made by *Francis?*—And of this point was more doubt conceived; wherefore they ordered it should be argued the next Term: and afterwards in *Hilary Term* it was moved again, and adjudged for the plaintiff.

Post. 364. Hob. 30. Dyer, 156. Cro. Eliz. 109. 2. Leon. 25. 1. Mod. 226. 237. 1. Vent. 382. 2. Vern. 729. Eq. Cas. 117. Cowp. 31. 771. See Dougl. 501. 1. Term Rep. 87. 488.

(*a*) Cro. Eliz. 723. Cro. Jac. 49. (*b*) 1. Roll. Ab. 616.

CASE 17. William Platt, Assignee of Richard Platt, *against* Plommer. *Michaelmas Term*, 20. *Jac.* 1. *Roll* 1759.

A copyholder in fee grants a lease, and afterwards surrenders to the plaintiff. *Quære*, If he can maintain an action *as assignee* against Hob. 178.

COVENANT. Upon demurrer the case was, That a copyholder in fee, with the lord's licence, made a lease for twenty-one years by indenture, rendering rent, wherein the lessee covenants for himself his executors and assigns, with sufficient sureties, that he will erect a pale about such a close, and lay upon the lands de-

the lessee for non performance of covenant? Cas. post. 44. Cro. Jac. 395. Yelv. 223. Carth. 205. Act. 3. Lev. 327. 1. Salk. 135. 6how. 285. Skin. 305.

mised

miſed yearly forty loads of dung, and ſufficiently repair the houſes. Afterwards the leſſor ſurrendered to the uſe of the plaintiff and his heirs, who was admitted accordingly; and for not performing theſe covenants the plaintiff, as aſſignee, brings his action of covenant.

PLATT *againſt* PLOMMER.

See Gilb. Ten. 99. 2. Com. Dig. 515. 2. Lev. 326. Dougl. 187. 461. 2. Term Rep. 484. 5. Co. 16. b.

The queſtion was, Whether the aſſignee may maintain this action by the common law, or by the ſtatute of 32. *Hen.* 8. c. 34.?

The defendant upon this declaration demurred.

The principal doubt was, Whether a copyholder, who comes to his tenement by ſurrender of the leſſor, be ſuch an aſſignee as may have an action of debt or covenant by the ſtatute of 32. *Hen.* 8. c. 34.?

SECONDLY, Admitting he be not within the ſtatute, Whether by the common law (covenants being made by expreſs words with the leſſor, his heirs, and aſſigns) the aſſignee for theſe covenants may maintain this action?

This caſe was moved by HENEAGE FINCH *for the plaintiff*, and by CRAWLY *for the defendant*. *Et adjournatur* (*a*).

(*a*) See S. C. Co. Copy. p. 87.

Knight *againſt* Harvy, Adminiſtrator of Harvy.

CASE 18.

Hilary Term, 22. *Jac.* 1. *Roll* 635.

DEBT brought in *Hilary Term*, 22. *Jac.* 1. upon an obligation of eleven pounds, dated 20. *May*, *anno viceſſimo regis nunc.* The defendant imparls; and in *Eaſter Term*, 1. *Car.* 1. the declaration and plea of the defendant was entered, and he declared therein upon an obligation dated 20. *May*, *anno* 20. *regis nunc.* Afterwards, by order of the court, the ſaid declaration was amended, and made *regis Jacobi*.

A miſtake of *the date* in a declaration of debt on bond is amendable after plea pleaded.

Cowp. 407. 425. Dougl. 114. 378. 1. Term. Rep. 782.

The defendant pleaded thereunto a judgment upon another bond of one hundred pounds, dated *anno quarto regis nunc* (which was miſtaken, for it ought to have been *regis Jacobi*), and that he had *riens en ſes maines* but only to ſatisfy that judgment; and thereupon the plaintiff joins iſſue, "that the ſaid recovery was made by fraud "and covin;" and found for the plaintiff.

To debt on bond if the defendant plead judgment recovered on an *impoſſible day*, and the plaintiff reply *per fraudem*; on iſſue joined thereon, and verdict in his favour, the plaintiff ſhall have judgment. Anne, 7. Poſt. 54. 78. 5. Co. 43. a. 8. Co. 93. Cro. Jac. 86. 678. Cro. Eliz. 227. Ld. Raym. 90.

This Term the defendant moved in arreſt of judgment, That this plea is repugnant and impoſſible; that a recovery ſhould be *anno* QUINTO *regis nunc*; and therefore the iſſue joined thereupon is nought, and no judgment can be given in this caſe.

But ALL THE COURT conceived, that foraſmuch as there was a default in the defendant's plea, although the plaintiff had joined iſſue thereupon, which is found to be falſe, and the defendant hath not confeſſed *aſſets* in his hands but only for that judgment, yet the plaintiff, having a good declaration, ſhall have judgment: whereupon it was adjudged for the plaintiff.

455. Hob. 326. Raym. 458. 1. Saund 228. 1. Salk. 173. 5. Mod. 310. Carth. 370. Lutw. 1380. 2. Burr. 999. 1. Term Rep. 782.

Case 19. Sir Edward Coke's Case.

Exceptions taken by *Sir Edward Coke* to the sheriff's oath of office, and resolutions of the Judges thereon.

SIR EDWARD COKE, late Chief Justice of the common pleas, and afterwards of the king's bench, and removed from his places, being made sheriff of the county of *Buckingham*, had a *dedimus potestatem* to take his oath annexed to a schedule; to which he took exceptions, for that there were more additions to the said oath than were in the ancient oath which is in THE REGISTER, and afterwards confirmed and appointed by the statute of 18. *Edw.* 3. c. 4.: he therefore conceived there ought not to be such additions unless by parliament. The additions were,

FIRST, "*That he should seek to suppress all errors and heresies com-*" *monly called* Lollories, *and should be assistant to the commissaries and* " *ordinary in church matters*:" which part of the oath was added by reason of the statute of 5. *Rich.* 2. st. 2. c. 5. and 2. *Hen.* 4. c. 15. whereby it is appointed that the same should be taken by the sheriff, especially for those two causes. But he thereto certified, That those statutes are repealed by the 1. *Edw.* 6. c. 1. and 1. *Eliz.* c. 2. and therefore ought not to be taken.

THE SECOND ADDITION was, "*That he should return reasonable issues*:" whereto he excepted, Because it is appointed by the statute, and penalties imposed for not performing it; and it ought not to be upon oath.

THE THIRD ADDITION was, "*That he should return all juries* " *of the nearest and sufficientest persons*:" whereto he excepted, Because that part of the oath is not appointed by any statute; and it is against common practice that he himself should return juries, it being commonly done by the under sheriff, who is also appointed by the statute to be sworn.

THE FOURTH ADDITION was, "*That he should cause the statute* " *of* WINTON, *and the statutes against rogues and vagabonds, to be put in* " *execution*:" whereto he excepted, Because the statute of *Winton* is altered, and the statutes against rogues and vagabonds are appointed to be executed by the justices of the peace, and not by the sheriff.

Upon these exceptions THE LORD KEEPER assembled all the Justices to confer with them about the same. And as touching

The FIRST POINT, They conceived it was fit to be omitted out of the oath, because it is appointed by statutes which are repealed, and were intended against the religion now professed and established, which before was condemned for herefy, and is now held for the true religion.

For THE SECOND ADDITION, They conceived it convenient and for the service of the king and subjects, and the greater part of them were of opinion, that an oath in this and the other points may be well enjoined by the king and order of state without parliament, and it may be well imposed upon the sheriff to take, being for public benefit and execution of the laws.

For THE THIRD ADDITION, It is not so strictly to be intended that he himself should return juries, but it ought to be intended according to the construction of law, that he himself, by himself or under-sheriff, should return juries; which is a sufficient performance; for the law saith, *qui per alium facit, per seipsum facit.*

For

For THE FOURTH ADDITION, It reſts upon the former reaſons, that this oath being appointed and continued divers years by direction of the ſtate, although without the expreſs authority of any ſtatute law, yet may he well be continued for the public benefit in repreſſing ſuch perſons: and although authority be given to the juſtices of the peace to put thoſe ſtatutes in execution, yet it doth not take away the ſheriff's right, who is THE PUBLIC CONSERVATOR *(a)*. And ſo they delivered their opinions to THE LORD KEEPER at his houſe at *Reading* *(b)*. SIR EDWARD COKE'S CASE.

(a) Lamb. b. 1. c. 3. 12. Hen. 7. pl. 17. 2. Hawk. ch. 8. f. 4. 5. Com. Dig. 480. 3. Bac. Abr. 286. 4. Bac. Abr. 449.

(b) See the 3 Geo. 1. c. 15. f. 18. for the preſent form of the oath to be taken by ſheriffs.

Memorandum.

CASE 20.

THAT the laſt of this Term there came a writ from the king to the juſtices of the common pleas, commanding the court to be adjourned from *Reading* to *Weſtminſter* in the county of *Middleſex*, and that all pleas and proceeding ſhould be adjourned to *Weſtminſter*, to be held there the day of *Octabis Hilarii* (and like writs were directed to the juſtices of the king's bench and barons of the exchequer); and it was openly read there, and then the adjournment made accordingly of all pleas, &c. unto *Weſtminſter*, &c. The courts adjourned from *Reading* to *Weſtminſter*. Ante, 13.

Hilary Term,

1. Car. 1. In the Common Pleas,

AT WESTMINSTER.

Sir Richard Hutton, *Knt. Chief Juſtice.*

Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Memorandum.

The death of HOBART, C. J. See 4. Term. Rep. p. 307.

IN this vacation SIR HENRY HOBART, *Knight* and *Baronet*, Chief Juſtice of the common pleas, died at his houſe in *Blyckling* in the county of *Norfolk*, being a moſt learned, prudent, grave, and religious judge.

CASE 2.

Sir Richard Udall *againſt* William Tindall, *Vicar of Alton.*

Hilary Term, 22. *Jac.* 1. *Roll* 733.

Woad, growing in the nature of an *herb*, ſhall be conſidered as *ſmall tithes.*

Hutton, 77. Bendl. 159. 3. Lev. 365. 2. Atk. 364. Palm. 222. 2. Inſt. 649. 1. Roll. 643. Carth. 264. Skin. 356. 1. Sid. 443. 4. Mod. 184. 2. Bulſt. 27. 3. Com. Dig 93. Bunb. 169. 344.

TRESPASS, for taking two loads of woad. Upon not guilty pleaded, a ſpecial verdict was found, that if woad be *minutæ decimæ*, then the jury find that the defendant is not guilty; if it be not *minutæ decimæ*, then they find for the plaintiff.

And it was argued by HENDEN, *Serjeant*, for the *plaintiff*, and by BRIDGEMAN for the *defendant.*

On the behalf of the plaintiff it was ſaid, That inaſmuch as it is ſo found without more circumſtances, it ſhall not be intended to be *minutæ decimæ*; for it may be, that a great quantity of woad may be ſown, and the greateſt part of the commodity of the pariſh may conſiſt in woad, and then it cannot be reputed *minutæ decimæ*: for although in their own nature they be *minutæ*, yet they now become *majores*, if the greateſt part of the profits of the pariſh conſiſts therein: for *minutæ decimæ* are properly intended ſuch which are but of ſmall conſideration in a pariſh, as herbs in a garden, and ſuch like; therefore he ſaid that woad ſown in the field is not *minutæ decimæ*; and that in 3. *Jac.* 1. upon a ſpecial verdict in *Eſſex*, in the caſe of *Hertman v. Boxley*, it was reſolved, that tithe of *welde*, which is a kind of graſs growing amongſt other grain, and commonly ſown therewith, were not *minutæ decimæ.*

BRIDGEMAN, *for the defendant*, vouched *The Dean and Chapter of Norwich's Caſe* (*a*), where it was adjudged upon a ſpecial verdict, that the tithes of forty acres of land planted with *ſaffron* appertained to the vicar and not to the parſon.

(*a*) Reported under the name of Beddingfield v. Freak, Cro. Eliz. 467. Moor, 909. Owen, 74. Goldſ. 149.

HENDEN,

HENDEN answered, That was not because they were *minutæ decimæ*, but for that upon the endowment found the allegation was that the parson should have tithe of corn and hay only. UDALL *against* TINDALL.

But YELVERTON said, That was not the reason, but because they were accounted as *minutæ decimæ*, and appertained to the vicar.

And ALL THE JUSTICES resolved, That woad growing in nature of an herb, the tithe thereof ought to be reputed for *minutæ decimæ*; and judgment was given for the defendant.

Mary Peacock, Executrix of Richard Peacock, *against* Steere. CASE 3.

RAVISHMENT DE GARD. The plaintiff declares, That one *John Steere* held such land of the testator by *knights service*, and died leaving his heir within age; and that the testator seized the said ward and died thereof possessed, and afterwards the defendant ravished him; the issue being upon the *tenure*, was found for the defendant. The question was upon the 4. *Jac.* 1. c. 3. Whether the plaintiff shall pay any costs? because she counts that she brings her action upon her own possession.

Plaintiff executor shall not pay costs. Post. 219. S. C. Hutton, 2. Lev. 165. 3. Lev. 60. 375. Strange, 682. 977. 6. Mod. 93. Dougl. 263. 4. Term Rep. 277.

And HUTTON, HARVEY, and MYSELF held, that the defendant shall not have costs; but YELVERTON *è contra*. *Vide Goldsmith v. Lady Platt* (*a*), *Haywarth v. David* (*b*), and *Fetherston v. Allybard* (*c*).

(*a*) Cro. Jac. 352. 2. Bulst. 284. (*b*) Mich. 3. Jac. 1. Cro. Jac. 229. (*c*) Cro. Eliz. 503. Godol. 268.

Easter

2. Car. 1. In the Common Pleas.

Sir Richard Hutton, *Knt. Chief Juſtice.*

Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Crumpe *againſt* Barne.

CASE 1.

ACTION FOR WORDS. Whereas the plaintiff was a citizen of *Glouceſter*, and ſo had been for twelve years, and uſed all that time the trade of a ſhoemaker, that the defendant to defame him ſpake theſe words of him, "He is a *bankrupt* "*rogue.*"

It is actionable to call a *ſhoemaker* "a bank-"rupt rogue;" for he is a *trader* within the ſtatutes of bankruptcy.

After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment that theſe words were not actionable; for "*bankrupt*" is not ſpoken indefinitely, nor abſolutely by itſelf, but as an adjective to "*rogue*;" ſo the words are extenuated. Alſo, a ſhoemaker is not ſuch a perſon as may have an action for theſe words, no more than a labourer or huſbandman; for he doth not live upon buying and ſelling, or upon credit, but upon his manual labour.

Cro. Eliz. 268. Cro. Jac. 345. Skin. 292. 3. Lev. 309. Bull. N. P. 39. 4. Burr. 2148. 1. Com. Dig. 183 503. 2. Bl. Com. 476. Cowp. 750.

But IT WAS RESOLVED, that the action lies; for the addition of "*rogue*" to "*bankrupt*" doth not extenuate but aggravate it, and ſhews his malice: and a ſhoemaker is ſuch a perſon as is within the ſtatute of bankrupts; for he lives by his credit in buying leather, and ſelling it again in ſhoes, &c. and not upon his manual labour only, as labourers and huſbandmen do. Whereupon it was adjudged for the plaintiff.

Foſter *againſt* Smith.

CASE 2.

ASSUMPSIT. Whereas the defendant was indebted to the plaintiff in ſeven pounds, that in conſideration thereof he promiſed to pay, &c. The defendant pleaded *non aſſumpſit*, and found againſt him: and it was moved in arreſt of judgment that the declaration is not good; becauſe he doth not ſhew any cauſe of the debt, *viz.* by bond or otherwiſe: and although he hath pleaded *non aſſumpſit*, and it is found againſt him, yet the declaration being ill the verdict doth not aid it. It was therefore ADJUDGED for the defendant.

A declaration in *aſſumpſit* muſt ſtate the certain cauſe of the debt.—*Vide* ante, 6.

10. Co. 77. a. Cro. Jac. 207. 213. 642. Hob. 5. Noy, 146. Dougl. 50.

2. Bulſt. 153. 1. Sid. 182. 2. Show. 347. 1. Com. Dig. 152. Cowp. 826.

Case 3.

Anne Smith *against* Anne Lady Wade, Executrix of Sir William Wade.

If a name be mistaken in a *habeas corpora juratorum*, as *Henry* instead of *William*, it may be amended after verdict.

Hutton, 81. 3. Co. 3. 5. Co. 43. Cro. Jac. 14. 354. 396. Jones, 302. 1. Com. Dig. 321. 3. Bac. Ab. 275. Cowp. 407. 425. Dougl. 115. 135. 1. Term Rep. 782. 3. Term Rep. 657.

ASSUMPSIT upon a promise of the testator's. After *non assumpsit* pleaded, and verdict found for the plaintiff, it was moved in arrest of judgment, that the writ and declaration were against ANNE, executrix of SIR WILLIAM *Wade*, and the issue. Record and *venire facias* were accordingly for a trial betwixt the said parties; but being tried by a *nisi prius* writ in *London*, the writ of *habeas corpora* was to have "*corpora juratorum, &c.*" betwixt the said ANNE SMITH and *Lady Wade*, executrix of SIR HENRY *Wade*, *knight*; so a misprision of HENRY *Wade* for WILLIAM *Wade*.

It was therefore moved in arrest of judgment, that it was a trial without warrant; for the record of *nisi prius* and the issue being against the executrix of *William Wade*, the *habeas corpora* was not sufficient, being *by* NISI PRIUS to try that issue.

But ALL THE COURT conceived, that inasmuch as the issue is good, the record of *nisi prius* good, the *venire facias* good according to the issue, although there be a misprision in the *habeas corpora*, it was but the fault of the clerk, and may be well amended; because there is not any alteration of the verdict, and it is well warranted by the former record: therefore it was appointed to be amended, and adjudged for the plaintiff.

Case 4.

Swayne *against* Rogers.

In the Exchequer Chamber.

In trespass for a battery, if before judgment the force is pardoned, there shall be no *capiatur*; but the pardon must be pleaded.

Post. 443. Cro. Jac. 149. 2. Lev. 36. Foster, 64. Dyer, 28. a. Plowd. 401.

TRESPASS FOR BATTERY in the king's bench, and judgment for the plaintiff.

Error in the exchequer chamber was assigned, for that the judgment was *capiatur*, whereas the battery was before the general pardon, so as the fine is pardoned, and the judgment ought not to have been a *capiatur* (*a*); for the Court is to take notice of the pardon and give judgment for the party, but not any fine.—*Sed non allocatur*: for the Court need not to take conusance thereof without demand of the party; and it doth not appear whether the party is any of the persons excepted, or one who is to have benefit of the pardon.

1. Mod. 71. 2. Hawk. P. C. 560.

If a verdict and *absolute damages* on a plea to which there was a demurrer, and *conditional damages* to which there was an issue, it is erroneous.

Post. 143. 1. Burr. 383. Dougl. 377. 730. 3. Term Rep. 240.

AFTERWARDS it was shewn that the declaration was of assault, battery, and imprisonment; and the defendant as to *the battery* pleads a justification; whereupon the plaintiff demurred: and as to *the imprisonment* he pleads another justification; whereupon the plaintiff takes issue, *de injuriâ suâ propriâ, &c.* and issue joined: and at the trial the jury found as to the plea for the battery, that the defendant did it *de injuriâ suâ propriâ*, and assessed damages five pounds and costs forty shillings; whereas they ought not to have meddled therewith, because a demurrer was thereupon, but only have found conditional damages if it should be adjudged for the plaintiff: and for the imprisonment they did not find the issue, but assessed conditional damages twenty shillings; so they found

(*a*) See 16. & 17. Car. 2. c. 8. and 5. & 6. Will. 3. c. 12. Post. 178. Cro. Eliz. 153. 178. Salk. 54. and 2. Bac. Abr. 515. *in notis.*

merely

merely croſs to what they ought, and the judgment upon this verdict for the five pounds coſts and the forty ſhillings found by the jury *nullo habito reſpectu* of the twenty ſhillings was merely erroneous. —Wherefore, although it was prayed that it might be amended, it appearing to be the miſpriſion of the clerk who entered the judgment, yet *non allocatur*; but the judgment was reverſed.

SWAYNE *againſt* ROGERS.

Smith *againſt* Richardſon.

CASE 5.

In the Exchequer Chamber.

ERROR upon an *aſſumpſit* in the king's bench; wherein the plaintiff declared, Whereas in conſideration the plaintiff had ſold to the defendant four bags of hops, whereof three bags weighed *ſeptem centenas et unum quarterium centenæ*, ANGLICE, ſeven hundred and one quarter of an hundred weight; and the other bag weighed *ducentas centenas et dimidium unius centenæ*, ANGLICE, two hundred and an half weight; that the defendant aſſumed to pay according to the rate of ſeven pounds for every hundred of the ſaid three bags, and according to the rate of ſix pounds ten ſhillings for every hundred of the other bag: *et dicit in facto* that the aforeſaid three bags, according to the ſaid rate, amounted to the ſum of fifty pounds and fifteen ſhillings; and the aforeſaid other bag, according to the rate aforeſaid, attained to ſixteen pounds five ſhillings, yet the defendant aforeſaid, &c.

A promiſe, in conſideration of the delivery of *ducentas centenas lupulæ*, ANGLICE 200 cwt. *of hops*, ſhall not be intended *of two hundred hundred*. Poſt. 386. 418. Bendl. 156. 10 Co. 130. a. 1. Lev. 33. 1. Sid. 60. 1. Com. Dig. 138. Comp. 682. Dougl. 158.

The defendant pleaded *non aſſumpſit*; and found againſt him, and damages given only according to the ſaid rate before mentioned, and judgment entered.

A writ of error was thereupon brought in the exchequer chamber; and the error aſſigned was, For that *ducentas centenas et dimidium unius centenæ*, ANGLICE, two hundred and an half weight, &c. This ANGLICE is void and repugnant to that which the ANGLICE was before, and contrary to the propriety of the words: for *ducentas centenas* is two hundred hundred, ſo it is much more than the price reacheth to; and it is without ſenſe, and therefore repugnant, and the declaration ill and judgment erroneous.

But ALL THE JUSTICES AND BARONS held, that it was no error, being in diſadvantage to the plaintiff and not material; for it reſts only in damages, and the jury hath given according to that rate, ſo as there is not any prejudice to the defendant: and the iſſue being upon *non aſſumpſit*, and found as is alledged, it is good enough; and judgment was affirmed.

A Caſe out of the Court of Wards.

CASE 6.

UPON the eleventh of *May* this Term all the Juſtices and Barons being aſſembled, THE CHIEF BARON propounded a caſe depending in the court of wards, *viz.* Two jointenants to them and their heirs, the one of them makes a conveyance to the uſe of himſelf and his wife for a jointure and the advancement of his ſon: Whether this be an aſſurance within the ſtatutes of 32. *Hen.* 8. c. 1. and 34. *Hen.* 8. c. 5. ſo as the king ſhall have the hird part?

A conveyance by *one* of *two* jointenants in tail to the uſe of himſelf and his wife, and the advancement of his ſon, is not within the ſtatutes of *Hen.* 8. of wills. *Vide* 12. Car. 2. c. 24.

SIR

See Might's Case, 8. Co. 163. b. 3. Co. 31. a. 10. Co. 83. Co. Lit. 76. 78. 2. Inst. 110. 3. Burr. 1489. 1. Bl. Rep. 476. and Mr. Hargrave's notes (1), (3), (4), Co. Lit. 111. b.

SIR RANDOLPH CREW, *the Chief Justice*, and THE CHIEF BARON were divided in their opinions from THE OTHER JUSTICES AND BARONS in this point, who all, upon that sudden motion, conceived it to be out of the statutes: for the words are, "*If any* "*sole seised, or jointly with others, &c.*;" there in such cases the statute provideth, that the king shall have "the third part upon such "conveyance:" but where two are jointly seised to them and their heirs, and the one makes a conveyance, this is out of the words of the statute of 32. *Hen.* 8. c. 1. and therefore ought not to be within the intent of 34. *Hen.* 8. c. 5. for that is a statute of explanation, and shall be construed only according to the words, and not with any equity or intendment; for there cannot be an explanation upon an explanation, as it is held in *Butler v. Baker* (*a*).—And JONES, *Justice*, said, it was so resolved *in the court of wards* by the opinion of the Chief Justice in the forty-third year of queen *Elizabeth*.

(*a*) 3. Co. 25.

CASE 7.

Memorandum.

A scire facias must issue from the court where the judgment was given; and *Qu.* What process shall be against an administrator in *England* to an intestate in *Wales*, against whom judgment in *debt* had been given at the grand sessions? for the record cannot be removed by *certiorari*.

1. Saund. 98. 2. Mod. 10. Vaugh. 397. 417. 2. Bulst. 58. Rep. 658.

AT the same time another question was moved amongst them: Where judgment is given in *debt* at the grand sessions in *Wales*, against a defendant inhabiting in one of those counties, and the defendant dieth intestate, and one who inhabits in *London* takes letters of administration; Whether any execution may be in *Wales*, because he neither inhabits nor hath any thing there? and if not, then, Whether that record may be removed into the chancery by *certiorari*, and sent by *mittimus* into the king's bench or common pleas, to the intent to take forth a *scire facias* upon it, to have lands out of *Wales* (or goods in the hands of the administrator liable to it there)?—And ALL THE JUSTICES AND BARONS conceived *que nemy*; for he may not have a *scire facias* in any court but where the judgment is given: and if such course should be used, all judgments in the courts in *London* or in inferior corporations would be removed and executed here, which would be a great inconvenience to the subject to make lands or persons liable to such judgments in other manner than they were at the time of the judgments: wherefore there is no remedy but to execute such judgments in their peculiar jurisdictions.

1. Lev. 291. 5. Com. Dig. 667. 2. Bac. Abr. 357. 1. Term Rep. 388. 3. Term

CASE 8.

Crane *against* Crampton.

In an *assumpsit* on a promise to pay such a sum on the marriage of the plaintiff, *notice* of the marriage need not be averred, nor *the day* that the request was made stated in the declaration.

S. C. Hutt. 80.

ACTION ON THE CASE on an *assumpsit*: That the defendant, in consideration of a *ruff-band* delivered to him by the plaintiff, promised to pay to him at the day of the said plaintiff's marriage the sum of three pounds; and alledgeth in fact, that he was married such a day, *et licet sæpius requisitus*, yet he hath not paid: and judgment was given upon *nihil dicit*.

After writ of enquiry of damages executed in *Norfolk*, it was moved in arrest of judgment, that the declaration was not good, because he doth not shew that he gave notice of his marriage before he married, for otherwise the defendant is not bound to take notice thereof; for it rests in the privity and knowledge of the plaintiff, and

and not of the defendant: and it cannot be a breach of promiſe unleſs the defendant hath notice given him before the marriage: alſo, the payment ought to be after requeſt, and the day of requeſt ought to be mentioned, for *licèt ſæpius requiſitus* will not ſerve: and it appears not that the requeſt was after marriage; for requeſt before will not ſerve.

CRANE *againſt* CRANE TON.

HUTTON, HARVEY, and YELVERTON, *Juſtices*, conceived it was good enough: for the defendant at his peril ought to take notice, and the plaintiff needs not ſhew that he gave notice of the marriage (*a*); and *poſtea requiſitus* ſufficeth (*b*) without ſhewing the day of the requeſt.

But I doubted thereof; for a precedent was cited of one *Morſe* (*c*) in the king's bench, where for not alledging notice the judgment was reverſed.

But, notwithſtanding this exception, judgment was given for the plaintiff.

(*a*) Cro. Jac. 102. 228. 405. 432. Yelv. 168. Cro. Eliz. 64. 1. Term Rep. 670. 3. Term Rep. 374.
(*b*) Cro. Jac. 183. Poſt. 139. 385. 1. Sid. 36. 5. Com. Dig. 52. 54.
(*c*) Cro. Eliz. 73. 218. Cro. Jac. 183. 522. Yelv. 66. Hutton, 2. 4. Leon. 2. Winch. 2.

Lacon *againſt* Barnard, Attorney.

Hilary Term, 20. *Jac.* 1. *Roll* 850.

CASE 9.

A recovery in *treſpaſs* for taking and driving away a flock of ſheep, and ſmall damages given, is no bar to *trover* for the ſame ſheep, if the plaintiff reply that the recovery was only for the *taking* and not for the *value*.

S. C. Hutt. 81. Styles, 201. Cro. Jac. 73. Raym. 472. Win. Ent. 61. 3. Lev. 125. 1. Com Dig. 112. 4. Bac. Ab. 117. Dougl. 112. 3. Term Rep. 292.

TROVER AND CONVERSION of one hundred ſheep, ſhewing that the plaintiff upon the twenty-fifth day of *March*, 19. *Jac.* 1. was poſſeſſed of thoſe goods and loſt them, and that upon the laſt day of *April* they came to the defendant's hands, who the ſame day ſold and converted them to his proper uſe.

The defendant for eleven of them pleaded *not guilty*; and as to the eighty-nine, the reſidue, he pleaded, that the plaintiff at another time, *viz.* on the eighteenth day of *September*, 19. *Jac.* 1. proſecuted an original writ out of the chancery, returnable in this court, againſt the defendant and one *Brian Smith*, *quare ceperunt et abduxerunt* 100. *oves*; and thereto they appeared, and the plaintiff counted againſt them of their taking of a hundred ſheep upon the fourteenth day of *April*, 19. *Jac.* 1.; and thereto they pleaded not guilty for the eleven ſheep, and for the eighty-nine reſidue they pleaded a recovery in debt by the defendant againſt *Edward Hatcliff* of a debt of ſixty pounds; and that the ſaid *Edward Hatcliff* was then poſſeſſed of the ſaid eighty-nine ſheep, and that by virtue of a *fieri facias* thoſe goods were ſold to him, whereupon he took them into his cuſtody. The plaintiff thereto replied, and took iſſue, and found for him, and damages aſſeſſed to twopence: and thereupon the plaintiff had judgment of the ſaid twopence damages, and had ſix pounds for coſts; and avers, that the ſaid taking and driving, for which the recovery in treſpaſs was had, and the converſion of the ſaid eighty-nine ſheep in this action be all one, and that the ſaid judgment is yet in force.

To this plea the plaintiff replies, that true it is he brought ſuch an action, and recovered the twopence for the taking and driving of the ſaid eighty-nine ſheep, and ſix pounds for coſts; but he farther ſaith, that the ſaid twopence damages was not aſſeſſed for the

value

LACON *against* BARNARD.

value of the said sheep and the conversion of them, and that the said defendant, at the day and year in the bill, sold the said eighty-nine sheep and converted them to his own use: the which conversion is the same conversion whereof he now complaineth: and traverseth, that the said taking and driving in the said action, whereupon he judgment was given, is the same trespass as to the conversion of those goods whereof the plaintiff now declareth.

Upon this replication the defendant demurred generally: and it was now argued at the bar by SERJEANT CREW, *for the defendant*, and by SERJEANT HENDEN, *for the plaintiff*; and after the said arguments at the bar, it was resolved

Post. 90. 2. Levinz, 124.

By HUTTON, HARVEY, and MYSELF, that this replication is good, and that the plaintiff ought to recover; for the damages of twopence given for the eighty-nine sheep being so small, is in itself an implication (and the Court shall so intend it) that it was given only for the taking and driving of them, and that the plaintiff had them again, and not in lieu of the value of them; for if it should be given for the value of them, then the plaintiff should thereby lose the property in them, and have nothing for his sheep but twopence, and the defendant should have the sheep: but the law will rather intend (and so it may be averred) that those damages were given only for the taking and driving, and that the plaintiff had them again, and afterwards lost them, and that the defendant found and after converted them, &c.: and this demurrer is a confession that he converted them after the said taking and driving; for the *action of trespass* is supposed to be upon the 14th *April*, 19. *Jac.* 1. and the *trover and conversion* in this action is supposed to be upon the 30th *April*, 19. *Jac.* 1. which well stands with the former action; for the defendant may take and chase them one day, and the plaintiff recover damages for the chasing, and after lose them, &c. And this first action is brought for the first taking and chasing, and the second for the conversion, so both may stand together, which is now confessed by the demurrer, and that the damages were given for the first taking and driving and not for the conversion; therefore they conceived the plaintiff should recover.

Vide 11. Rich. 2. tit. Trespass, 207. 40. *Edw.* 3. f. 27 46. *Edw.* 3. f. 18. 14. *Hen.* 7. f. 12. 44. *Edw.* 3. f. 2.

But YELVERTON held, Because the action of trespass is *cepit et abduxit*, therefore it includes that the defendant had them, and *ousted* the plaintiff of the possession: and although the damages be small, it shall be intended to be given for the sheep; and if so, then he cannot have an action for converting them afterward.—But judgment was given for the plaintiff.

Trinity

Trinity Term,

2. Car. 1. In the Common Pleas.

Sir Richard Hutton, *Knt. Chief Juſtice.*

Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Henry Yelverton, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Shelden, *Knt. Solicitor General.*

Crips *againſt* Gryſil.

CASE 1.

Trinity Term, 1. *Car.* 1. *Roll* 1932.

A deviſe of "all "my mort- "gages" conveys lands in fee mortgaged to the teſtator, although open to the equity of redemption; and the deviſee may enter on non-payment. Poſt. 447. 450. Moor, 59. 2. Vernon, 621. 1. Ch. Rep. 33. Powell, 152. Cowp. 94. 657. 660. 3. Term Rep. 356.

EJECTMENT of lands in *Leighton-Buſſard* of the demiſe of *Robert Key*. Upon a ſpecial verdict the caſe was, That *John Gryſil*, father of the defendant, was ſeiſed in fee of the ſaid lands, and upon the 10th *October*, 16. *Jac.* 1. by indenture of feoffment mortgaged them to *Peter Key* and his heirs, upon condition, that if he or his heirs paid to *Peter Key* and his heirs one hundred and ſixty pounds upon the 20th *October* 1624, he might re-enter. That afterwards, upon the 30th *March* 1619, the ſaid *Peter Key*, by his will in writing, gave to *Robert Key* "all his goods, "monies, bills or bonds, mortgages or ſpecialties for monies," and made him his executor, and died; and that the one hundred and ſixty pounds not being paid, *Robert Key* entered and let to the plaintiff.—And, without argument, the opinion of THE COURT was, that theſe words "all my mortgages" made a good deviſe of the lands mortgaged. Whereupon judgment was given for the plaintiff.

Dougl. 759. 763.

NOTE. This mortgage was not *forfeited* at the time of making the will. *L. C. B.* PARKER's *MSS.*

Reymund *againſt* Hundred of Oking.

CASE 2.

The maſter of a ſervant robbed may maintain an action in his own name on the ſtatute of *Winton*; but the ſervant muſt be ſworn purſuant to 27. *Eliz.* c. 13. Poſt. 336. 2. Salk. 613. Comb. 263. 4. Mod. 303. 12. Mod. 54. Styles, 156. Latch. 127. 3. Com. Dig.

ACTION upon the ſtatute of *Winton*. Whereas one *Palmer*, the plaintiff's ſervant, was robbed within the ſaid hundred of ſixty-eight pounds of the plaintiff's money by perſons unknown, and had made HUE AND CRY according to the ſtatute, and none of the thieves were taken; and the ſaid *Palmer* had made oath before ſuch a juſtice of peace of the ſaid county next adjoining to the ſaid hundred within twenty days before this action brought, that he did not know any of the parties who robbed him, and that the ſaid hundred had not made him any recompence.

Upon not guilty pleaded, and tried at the bar this Term, and found for the plaintiff, it was moved in arreſt of judgment, that this action lies not, becauſe the plaintiff himſelf was not ſworn that he knew not any of the parties who did the robbery: for it is not ſufficient that the ſervant who was robbed was ſworn; for by the

Cro. Eliz. 142. Leon. 323. 3. Mod. 288. Shower, 94. Carth. 145. Holt, 460. 475. 476.

RETURNED *againſt* HUNDRED of OXING.

ſtatute of 27. *Eliz.* c. 13. the party who brings the action ought to make the oath: and it was argued, that the ſervant who was robbed ought to have brought the action, and then his oath would have been ſufficient; but when the maſter brings the action, he himſelf ought to be ſworn that he knew not any of the robbers, otherwiſe he might not bring it, and therefore the action lies not.

Poſt. 336. Cro. Jac. 224. Cro. Eliz. 142.

But it was reſolved by THE COURT, that the action well lies for the maſter, and that the ſervant's oath was ſufficient; for it is properly in his notice that he was robbed, and did not know any of the robbers, and the maſter knows not that he was robbed, or who were the perſons, but by report of his ſervant; and it would be inconvenient if the maſter ſhould not bring the action, but the ſervant only, for the ſervant might releaſe or compound, or diſcontinue the ſuit, and ſo the maſter ſhall have the loſs by his falſehood; therefore the maſter ſhall bring the action, and have his ſervant who was robbed be his witneſs; whereupon it was adjudged for the plaintiff.—SEE *Co. Ent.* where ſuch action is brought by the maſter, and the ſervant ſworn.

See 8. Geo. 2. c. 16.

CASE 3.

Sir Robert Baniſter's Caſe.

The leſſee of tithes may maintain an action of debt for not ſetting them out.

DEBT for not ſetting out of tithes. Upon a ſpecial verdict the caſe was, A parſon made a leaſe of his rectory 9. *Eliz.* for ſixty years, which was confirmed by the ſucceeding biſhop and ſucceeding patron, neither of them being biſhop or patron at the time of the leaſe.—Reſolved PER TOTAM CURIAM, that it was good, according to the opinion in *Newcomen's Caſe*, 5. *Co.* 15. And ſo without argument it was adjudged for the plaintiff.

1. Roll. Rep. 371. 361. Co. Lit. 301. b. 1. Roll. Ab. 481. 3. Bulſt. 238.

CASE 4.

Ayleſworth *againſt* Chadwell.

In the Exchequer Chamber.

A clerical miſpriſion in judicial proceſs is amendable. Poſt. 90.

ERROR of a judgment in debt, upon an obligation in the king's bench.

THE FIRST ERROR aſſigned was, That the parties being at iſſue, the awarding of the roll was of a *venire facias* returnable *die Martis poſt Craſtin. Purificationis.* And the *venire facias* was made returnable *die Sabbati poſt Octabis Purificationis.*

Dyer, 129. Yelv. 64. Cro. Jac. 64. 8. Co. 161. 1. Com. Dig. 316. 1. Bac. Ab. 100. 3. Bac. Ab. 273. Cowp. 407. 425. 841. Dougl. 115. 136. 1. Term. Rep. 782. 3. Term Rep. 349. 657.

THE SECOND ERROR was, That the *venire facias* did bear date the twelfth day of *February*, and was returnable *die Sabbati poſt octabis Purificationis*, which is before the *teſte*.

Sed non allocantur: for being a judicial proceſs, and the fault of the clerk, it ſhall be amended; and thereupon judgment was affirmed.

CASE 5.

Browne *againſt* Taylor.

Hilary Term, 22. *Jac.* 1. *Roll* 1669.

A. being ſeiſed of tenements holden by *knight's ſervice*, ſuch perſon or ſpecified; and have the rents wife ſhall take

EJECTMENT of a leaſe of *Sir John Savil* and others of lands in *Stapleton*. Upon not guilty pleaded, it was found for *two*

ENFEOFFS certain perſons to the uſe of himſelf for life, and after his deceaſe to the uſe of perſons as he ſhould appoint by his will, for ſuch intereſts as in his ſaid will ſhould be DEVISES a certain term to all his tenants to commence after his deceaſe, that *A. B.* ſhould out of his land for life; and that his wife ſhould have all his land in *S.* for her life. The the land by the *immediate deviſe*, and not by the *declaration of uſes*.

parts

parts for the defendant, and a ſpecial verdict for *a third part*, that one *Holgate* was ſeiſed of theſe tenements holden by KNIGHT'S SERVICE; and in 21. *Jac.* 1. infeoffed *Spencer* and others to "the "uſe of himſelf for life, and after his deceaſe to the uſe of ſuch "perſon or perſons as he ſhould appoint by his will, for ſuch in- "tereſts or otherwiſe as in his ſaid will ſhould be ſpecified." Afterwards he makes his will in writing, and thereby deviſeth that all his tenants of his farms ſhall enjoy their tenements for twenty-one years after his deceaſe, and that *R. T.* ſhall have the rent out of his land for his life, payable at two Feaſts of the year; and deviſeth to his wife "ALL his lands in *Stapleton* for her life." BROWNE *againſt* TAYLOR.

The queſtion was, Whether this is a good *declaration of the uſes* to limit it to his wife, and that ſhe ſhall take it by *the feoffment*; or whether by the *immediate deviſe* (and then the deviſe is void for a third part, becauſe the lands are holden IN CAPITE)?

After argument at the bar, without any at the bench, HUTTON, HARVEY, and YELVERTON agreed, that they ſhould take by *the deviſe*, and not by *declaration of the uſes*: FOR THEY HELD, that after the feoffment in this manner he hath a *qualified fee* in him *as owner*, ſo as he may make his will of thoſe lands and *deviſe* the rent as owner thereof; and then the land being held by KNIGHT'S SERVICE (*a*), the deviſe is void for a third part: or he may declare his will, as *upon the feoffment*, which ſhall inure as a *declaration of the uſes* upon the feoffment; and then *all* the land paſſeth; ſo that here, when he makes his *will*, without reference to the *feoffment*, the law will conſtrue it as the will of one who is owner, and may diſpoſe of it as owner, and not as a declaration of the uſes, which is an authority only. Alſo the will appoints *rents* to be paid, which is a good will and deviſe, but the authority *limits* him, that he may not appoint any rents to be paid: and to have it to be a will for one part, and to diſpoſe as by authority for another part, cannot be good in law; therefore it ſhall be adjudged as a will to enure for both.

Co. Lit. 271. b. 6. Co. 18. a. Mr. Hargrave's Co. Lit. 22. b. note (2), and 111. note (1). Cro. Eliz. 877. Cro. Jac. 31. Moor, 567. 10. Co. 143. 2 Roll. Ab. 263. Jones. 392. 1. Vent. 225. 1. Atk. 559. Hard 395. 1. Ch. Caſ. 103. 1. Lev. 150. Powel on Powers, 124. 3. Term Rep. 665.

But I doubted thereof, and conceived it might be well conſtrued as a declaration; and thereby it ſhall be a good limitation for all the lands; and that by the ſaid authority he might diſpoſe of the rent out of the land; and *his declaring that his tenants ſhall hold their farms for twenty-one years after his deceaſe* cannot be but *by declaration*: and it is more for the advantage of the parties that it ſhould be ſo conſtrued; and the law ſhall expound for the greateſt benefit of the parties, when by any conſtruction it may be: and by this means all the parts of the will may take effect.

But THE THREE OTHER JUSTICES held, that he could not diſpoſe of *the rent*, by reaſon of the ſaid words, but of *the eſtate* of the land only. Whereupon, without any argument, they adjudged for the plaintiff.

See 6. Co. 17. & 18. Cleere's Caſe, and 10. Co. 85. Lovie's Caſe.

(*a*) See 12. Car. 2. c. 24.

Michaelmas Term,

2. Car. 1. In the Common Pleas.

Sir Richard Hutton, *Knt. Chief Juſtice.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Henry Yelverton, *Knt.*
Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Love *againſt* Playter.

Eaſter Term, 2. Car. 1. Roll 386.

Qu. If an action can be maintained for calling an attorney *diſhoneſt*, without alledging it to be in his *practice*. Ante, 192. Moor, 61.

ACTION FOR WORDS. Whereas the plaintiff is, and had been an attorney of the common pleas for thirty years, That the defendant to deprave him ſpake theſe words, "Thou art the diſhoneſteſt attorney in *England*, and if any be "more diſhoneſt than thou art he deſerves to be hanged." After verdict, upon not guilty pleaded, it was found for the plaintiff; and now moved in arreſt of judgment, that theſe words are not actionable, becauſe he doth not ſay that he was diſhoneſt in his practice as attorney; and it may be in other matters: alſo he doth not aver that there were any diſhoneſt attornies in *England*; and the Court ſhall not intend it, without ſhewing thereof. And a precedent was cited of *Walter v. Brown*, "Thou art as very a thief as "any is in *England*;" and he did not aver that there was *any thief in England*; and no judgment was there given for the plaintiff: whereupon THE COURT would further adviſe; but there was no judgment given herein, for the parties agreed.

CASE 2.

Windſor *againſt* the Inhabitants of Farnham.

In the Court of Chancery.

A decree in chancery made purſuant to the directions of an act of parliament, cannot, like other decrees, be re-examined upon a bill of review. Jones, 147. N. R. 38. Poſt. 351. R. N. 295. Bac. Ord. 1, 2. 1 Ark. 534. 2. Ark. 5 9. 2. Peere Will. 283. 2. Freem. 88. 1. Vern. 135. Hinde, 55 to 66.

NOTE. Upon a reference out of the chancery betwixt *Thomas Windſor* and the inhabitants of *Farnham* to SIR RANDOLPH CREW, *Chief Juſtice*, SIR JOHN WALTER, *Chief Baron*, SIR WILLIAM JONES, and to MYSELF, the ſole queſtion being, Whether *a decree* made by commiſſioners upon the 43. *Eliz.* c. 4. of charitable uſes, and exceptions put in againſt it in chancery, and there examined, heard, and confirmed in part and altered in part, may now be re-examined upon *bill of review*, as other bills of review, upon decrees in chancery.—And IT WAS RESOLVED by all of us, that this *bill of review* is not allowable, but the decree in chancery is concluſive, and not to be further examined, becauſe it takes its authority by the act of parliament; and the act doth mention but one examination; and it is not to be reſembled to the caſe where a decree is made by the chancellor by his ordinary authority.—And JONES ſaid, that ſo it is upon a decree made upon the ſtatute of 37. *Hen.* 8. c. . by the major part, and confirmed by the chancellor, which is not re-examinable: and ſo thoſe opinions were certified in chancery.

Mitford's Pleadings, 78, 79. 4. Vin. Abr. 414. And ſee Williams's edition of Harriſon's Chancery, p. 169.

Tutter

Tutter *againſt* The Inhabitants of Dacorum.

CASE 3.

Trinity Term, 2. Car. 1. Roll 1717.

ACTION upon the ſtatutes of *Winton* and 27. *Eliz.* c. 13. of *hue and cry*, alledging the robbery to be committed at *Shely* and *Ridge, in diviſis hundredorum de Dacorum et Caſhio*, in the county of *Hertford*, and that he made *hue and cry*, and gave notice of the robbery at *South Mims*, within the county of *Middleſex*, near the hundreds aforeſaid, and ſhews all other circumſtances according to the ſtatutes. The defendants plead not guilty; and found againſt them.

It is not neceſſary that *the notice* required by the 27. *Eliz.* c. 13. in HUE AND CRY ſhould be within the county; if it be given near to the place where the robbery was committed it is ſufficient. Poſt. 379. Show. 94. March, 11. 2. Leon. 82. Noy, 52. Bull. N. P. 185.

And now moved in arreſt of judgment, that this declaration is not good; for he alledgeth the notice to be given at *South Mims*, within the county of *Middleſex*, which is in another county from that where the robbery was committed: and he doth not ſay *prope locum ubi roberia facta fuit*, but *prope hundredorum*, which may be ten miles from the place where the robbery was done: and then it is not according to the 27. *Eliz.* c. 13. which appoints it to be given *near* the place where the robbery was done: and divers precedents were ſhewn to that purpoſe (*a*). And likewiſe the words of the ſtatute of 27. *Eliz.* c. 13. were inſiſted upon, "That none ſhall have "actions upon thoſe ſtatutes except the ſaid perſons ſo robbed, "with as much convenient ſpeed as may be, give notice of the "robbery to ſome of the inhabitants of ſome town, village, or "hamlet, near the place where any ſuch robbery ſhall be commit-"ted:" and ſo, not being alledged that notice was given to the inhabitants near the place where the robbery was committed, it was ſaid not to be good.

But on the other ſide it was urged that the allegation that notice was given to the inhabitants in a village out of the county is clearly good, being near the place where the robbery was committed, for a ſtranger cannot know the diviſion of the counties; and ſo it hath been ruled here: and the allegation that *South Mims* is near the hundred is good enough, and may be well intended in the diviſion where the robbery was done; eſpecially it being after verdict, and that the jury would not have found the defendants guilty unleſs it had been ſo proved. And a precedent was cited (*b*), where an action was brought againſt the hundreds of *Langtree* and *Crawthorn*, and the robbery was alledged to be at *Torlton*, in *diviſis hundredorum prædictorum*, and notice and hue and cry were alledged to be at *Cirencester*, in the diviſion of the hundred aforeſaid; and the plaintiff after verdict had judgment.

And ALL THE COURT, upon view of that precedent, conceived the declaration to be good enough, and that the hue and cry being alledged to be made out of the county was not material, being near the place where the robbery was done; which place being alledged to be near the diviſion of the hundred aforeſaid, ſhall be intended near the diviſion of the hundreds where the robbery was done, and not at the moſt remote place thereof; for that ſhould be a foreign

(*a*) Trinity Term, 30. Eliz. Roll 1425. and Hilary Term, 36. Eliz. Roll 506.

(*b*) 5. Jac. 1. New Bk. Ens. p. 348.

TUTTER *againſt* INHABITANTS of DACORUM.

intendment, but it ſhall be good either way; and the beſt courſe is to alledge it to be at the place where the robbery was committed, or at the village near the place thereunto: but *prope diviſis* ſhall be ſo intended, eſpecially after verdict. Wherefore it was adjudged for the plaintiff.—In the caſe of *Foſter v. the Hundred of Spelthorn* (*a*), ſuppoſing the robbery to be made at *Bodſom*, PROPE *diviſis hundredorum prædictorum*, and alledges the *hue and cry* was made, and notice given to the inhabitants of *Hatton*, PROPE *diviſis hundredorum prædictorum*; and yet adjudged for the plaintiff.

(*a*) Cro. Jac. 675.

See 8. Geo. 2. c. 16. for other forms of proceeding upon hue and cry.

CASE 4.

Rowden *againſt* Maltſter.

Trinity Term, 18. *Jac.* 1. *Roll* 1051.

If a copyhold be ſurrendered to the uſe of a laſt will, and deviſed to *A.* in tail, who, after *iſſue* born, ſurrenders to his wife for life, and there is no cuſtom to entail ſuch eſtate. *A.* ſhall take *a fee conditional*; and the ſurrender to his wife is good, the condition being performed by the birth of iſſue.

S.C. Godb. 367. 1. Roll. Ab. 838. Co. Lit. 60. note (3). 2. Saund. 422. 3. Lev. 327. Atk. 385 to 390. 2. Atk. 37. 45. 85. 101. 189. 2. Vezey, 603. Co. Copyh. ſect. 47, 48, 49. 3. Co. 8. 2. Bl. Rep. 946. 2. Bl. Com. 113.

TRESPASS for entering into lands in *Menewden*.

Upon not guilty pleaded, a ſpecial verdict was found, That *George Sterling*, a copyholder in fee of the manor of *Menewden*, in 39. *Eliz.* ſurrendered it into the hands of two of the tenants of the ſaid manor, to the uſe of his will, and had iſſue two ſons, *John* and *Henry*, and deviſed the ſaid copyhold land to *John* and the heirs male of his body, the remainder to *Henry* and the heirs male of his body, with remainder over; and afterward died. This ſurrender was afterward, in 41. *Eliz.* preſented by the homage, and *John* the eldeſt ſon admitted thereto, *habendum* to him and his heirs. Afterwards *John* had iſſue three ſons, and ſurrendered the ſame to the uſe of his will, and thereby deviſed it to *Katharine* his wife for her life, and dies; and in 43. *Eliz.* the ſurrender was preſented, and ſhe admitted; afterwards the three ſons of the ſaid *John* died without iſſue: and they further find, that no copyholder may ſurrender or deviſe his copyhold lands in tail: and that afterwards the ſaid *Katharine* married *J. S.* who let to the plaintiff for a year, who entered accordingly, and the defendant, by the command of *Henry*, ouſted him. *Et ſi ſuper totam materiam, &c.*

The ſole queſtion was, When a copyholder in fee ſurrenders to the uſe of one in tail, there being no cuſtom to warrant ſuch an entail, whether it be an eſtate tail by the ſtatute of Weſtm. 2. *de donis conditionalibus*, or a fee ſimple conditional at the common law?

It was argued at the bar, and after ſolemnly at the bench, becauſe it was a general cauſe, and might concern divers copyholds.

Burr. 206. 979. 1. Wilſ. 26. Strange, 1197.

Copyholds are included within the general words of a ſtatute, "*lands*, "*tenements*, and "*hereditaments*," when no prejudice thereby enſues to the lord. 3. Co. 8. 3. Lev. 327. Savil, 67. Dalſon, 16. 2. Inſt. 343. Carth. 23. 2. Com. Dig. 527.

YELVERTON, *the puiſne Juſtice*, held, that it was an eſtate tail by the equity and intent of the ſtatute *de donis conditionalibus*, although it were not within the expreſs words thereof; for in all ſtatutes made for the good of the commonwealth, and wherein no prejudice accrues to the lord or tenants, by reaſon of the alteration of any

intereſt,

intereſt, ſervice, tenure, or cuſtom of the manor, there the general words of ſuch acts of parliament do extend to copyhold lands (*a*); as the ſtatute of *Merton*, c. 1. which gives damages to a *feme covert* upon a recovery in a writ of dower, where the *baron* died ſeiſed, extends to copyholds: and the ſtatute of *Weſtminſter* 2. c. 3. and the three ſeveral branches of that ſtatute; the one, which giveth the *cui in vita* upon a diſcontinuance made by the huſband; the ſecond, which giveth the receipt to the wife upon her huſband's refuſal to defend the wife's title; and the third, which giveth a *quod ei deforceat* to particular tenants, extend to copyholds: and the ſtatute of 32. *Hen.* 8. c. 9. againſt champerty and buying of litigious titles, and 32. *Hen.* 8. c. 28, which giveth an entry in lieu of a *cui in vita*, extendeth to copyholds, becauſe theſe ſtatutes are beneficial to the commonwealth, and not at all prejudicial to the lord in the alteration of tenure, eſtate, ſervices, &c.; as the caſe cited in 4. *Co.* 26. & 30. proves (*b*), and from whence he inferred the ſame concluſion, that this ſtatute *de donis conditionalibus* being made for the general good of all, and the extending it to copyholds was no way prejudicial either to the lord or tenants, and therefore they are to be intended within the equity and meaning thereof; otherwiſe A FORMEDON IN DESCENDER would not lie of a copyhold, which none can have but tenant in tail; and a remainder limited upon ſuch an eſtate hath been allowed, and therefore is no fee conditional; for neither upon a fee abſolute or conditional can a remainder in tail by any means depend. And as to that objection that a copyholder in fee cannot hold of the donor, but muſt hold of the lord, he ſaid, that he might well hold of the donor, as 11. *Co. Sir Henry Nevill's Caſe*, 17. b. where we find that a manor was held by copy of court roll, and had other copyholds under it to hold thereof; and by the ſame reaſon tenant in tail of a copyhold may hold of his donor, and he ſhall hold over of his lord. And as to the objection which was made, that if an eſtate tail ſhould be allowed in copyholds, there would be a perpetuity maintained: ſo as it could not be cut off, he ſaid, it might be cut off by a recovery in the court of the manor, as the YEAR-BOOKS are in 23. *Hen.* 8. BROOK "*Recovery in Debt*," 27. and 19. *Hen.* 6. *pl.* 64. and 26. *Hen.* 6. *pl* 6. and *Plowd.* 59. And he ſaid, he knew no reaſon but a copyhold might as well be intailed as titles of honour, which concern the perſon of a man, or a villein, or liberty of franchiſe; and if copyholds might not be intailed, it would deprive them of one of thoſe privileges which any man who hath an inheritance ought to have, *viz.* where a gift is to him and the heirs female of his body, if he hath a ſon, his daughters ſhall not inherit: and for that he vouched 37. *Hen.* 8. "*Done*," 61. and ſaid, there were many precedents and authorities that copyholds might be intailed; and cited *Litt. fol.* 16. *f.* 76. *Plowd. Mans. Caſe, fol.* 2. 15. *Hen.* 8. "*Tenant in Tail by Copy of Court roll*," 24. *et anno* 3. *Mariæ*, *Dyer*, 192. *and the Old Book of Entries*, 129. where are two precedents, the one in 3. *Hen.* 8. the other in 29. *Hen.* 8.

4. Co. 26. a. Co. Lit. 369. b.

9. Co. 105. a.

Co. Lit. 58. b. Cro. Jac. 260. cont.

Co. Lit. 60. b.

Co. Litt. 58. b.

(*a*) 2. Inſt. 343. 3. Co. 9. a. 3. Lev. limitations. Moor, 420. Ld. Raym. 78. 376. Strange, 253. 258. Gilb. Ten. 164. 132. Strange, 253. 258.

(*b*) Copyholds are within the ſtatute of

Copyholds are not within the general words of a ſtatute that alters the ſervice, tenure, cuſtom, or intereſt of the land; and therefore *a jointure* made of copyhold lands is no bar to *dower* within the ſtatute 27. *Hen.* 8. c. 10.

But on the contrary it was argued by the three other juſtices, HUTTON, HARVEY, and MYSELF, that this was not an eſtate tail by THE STATUTE OF WESTMINSTER THE SECOND, *de donis conditionalibus*, but a fee ſimple conditional at the common law, and then the plaintiff hath a good title; and that the ſurrender to the uſe of his wife for life being after iſſue had, ſhall give to her an eſtate for life, and is good as well againſt the donor as his iſſue: for when an act of parliament altereth the ſervice, cuſtom, tenure, intereſt of the land, or other thing in prejudice of the lord or tenant, there the general words of ſuch an act ſhall not extend to copyholds (*a*); as the ſtatute *Weſt.* 2. c. 20. which giveth the *elegit*, extendeth not to copyhold lands, becauſe it would be prejudicial to the lord, and a breach of the cuſtom, that any ſtranger ſhould have intereſt in the lands holden by copy without the admittance and allowance of the lord. And the ſtatute of 27. *Hen.* 8. c. 10. of uſes, toucheth not copyhold (*b*), becauſe the tranſmutation of poſſeſſion, by the ſole operation of the ſtatute without allowance of the lord, would tend to the lord's prejudice. And the ſtatutes of 31. *Hen.* 8. c. 1. and 32. *Hen.* 8. c. 32. whereby *jointenants* and *tenants in common* are compellable to make partition, extend not to copyholds (*c*). And the ſtatute 32. *Hen.* 8. c. 28. which confirmeth leaſes for twenty-one years made by tenants in tail, or by the huſband and wife, of the lands of the wife, touch not copyhold lands (*d*), for that ſtatute warrants only the leaſing of ſuch lands as are grantable by deed; but ſuch are not copyhold lands; for though by the lord's licence they may be demiſed by indenture, yet in their own nature they are demiſable only by copy, and therefore out of the general purview of that ſtatute. And for the ſame reaſon the ſtatute 32. *Hen.* 8. c. 34. which giveth an entry to the grantee of a reverſion, upon the breach of a condition by the particular tenant, toucheth not copyhold. So here in this caſe we held, that the ſtatute *Weſt.* 2. c. 1. of intails, did not extend to copyholds, becauſe it would be prejudicial to the lords: for by this means the tenure would be altered; for the donee in tail, without any ſpecial reſervation, ought to hold of the donor by the ſame ſervices that the donor holdeth over; and he who comes in by ſurrender and the admittance of the lord, to hold to him and the heirs of his body, cannot hold of him who ſurrendered, but ſhall hold of the lord, and is tenant at will unto him, and ſhall do the ſervices to him as lord. *Vide* 2. *Edw.* 4. *pl.* 6. 4. *Hen.* 6. *pl.* 17. 41. *Edw.* 3. *pl.* 45. & 45. *Edw.* 3. *pl.* 19.

2. Inſt. 397. 3. Co. 9. a.

Ante, 24, 25. Cro. Jac. 305.

SECONDLY, We held, that in reſpect of the baſeneſs of their eſtate, the ſtatute never intended to provide remedy for them nor their alienations: for the words of the ſtatute are, "*Quod voluntas donatoris in charta ſua manifeſtè expreſſa de cætero obſervetur*;" which proveth, that the intent of the makers of the ſtatute was, that no

Gilb. Ten. 165.

(*a*) 3. Co. 8. a. Moor, 128. Stra. 516. Ld. Ray. 1066. Gilb. Ten. 164. Salk. 297. 4. Mod. 83. 85. 3 Bac. Abr. 322. Harg. Co. Lit. 187. a. note (2).

(*b*) 4. Mod. 85. Cowp. 709. Dougl. 716.

(*c*) 3. Bac. Abr. 322.

(*d*) Co. Copy. 152. Co. Lit. 44. 6. Co. 37. 3. Lev. 327.

heredita-

hereditaments ſhould be entailed within this ſtatute, but ſuch as either was or might be given by charter or deed: but copyholds are no ſuch hereditaments, and therefore not within the meaning of that act; and for that were cited *Litt. fol.* 16. 21. *Hen.* 6. *pl.* 37. 11. *Hen.* 4. *pl.* 8. 2. *Hen.* 4. *pl.* 12. 13. *Rich.* 2. "*Faux Judg-*"*ment*," 7. 14. *Hen.* 4. *pl.* 34. 7. *Edw.* 4. *pl.* 19. 21. *Edw.* 4. *pl.* 50. 4. *Co.* 21. ROWDEN *againſt* MALTSTER.

And WE ALSO HELD, that copyholds could not be entailed, becauſe copyholders at the time of making the ſaid ſtatute, and for divers years after, were only tenants at will of the lord, and the lord might have ouſted them, and they had no remedy unleſs in chancery. Copyholds cannot be intailed by virtue of the ſtatute *de donis* only; cuſtom muſt co-operate with the ſtatute.

Co. Lit. 60. a. b. 3. Co. 8. Carth. 22. Cro. Eliz. 307. 3. Lev. 327. 4. Mod. 86. 2. Atk. 101. 3. Term Rep. 470.

THIRDLY, If copyholds might be intailed, then the perpetuity of ſuch eſtates muſt be maintained; for a fine cannot be levied of copyhold lands to bar the intail; nor can a recovery in value be intended of ſuch an eſtate where warranty cannot be annexed to it: alſo many other miſchiefs would enſue thereupon, as well to the lord as to the copyholders themſelves; for then the tenants could not provide for their wives and children, nor make leaſes to others for years to bind their iſſue with the lord's licence: and lords would loſe the wardſhip of their tenants in ſuch manors where by cuſtom they belong to them; and there would not be ſo often changes of tenants as before, whereby lords would loſe their fines. A fine cannot be levied of copyhold land to bar the entail.

3 Co. 8. 9. Co. 105. Co. Lit. 60.

LASTLY, We held, that neither eſtate tail, nor eſtate tail after poſſibility of iſſue extinct (which hath a neceſſary dependence upon an eſtate tail), can by any particular cuſtom be allowed (*a*); for no eſtate tail was before THE STATUTE DE DONIS, but all inheritances were either FEE SIMPLE *abſolute* or *conditional*; and the ſtatute being made 13. *Edw.* 1. which is within time of memory, no cuſtom can have commencement ſince then; for then a cuſtom might begin within time of memory, which is repugnant to the rules of cuſtom: and in proof thereof were cited 34. *Hen.* 6. *pl.* 36. 4. *Co.* 87. 5. *Co.* 52. And in anſwer to the authorities vouched, we ſaid, there were none which mentioned copyhold lands to be either within the words of the ſtatute DE DONIS, or within the equity thereof, beſides PLOWDEN, in *Manxell's Caſe*: and that the general current of opinion in all our books is, that an eſtate in copyhold lands, limited to a man and the heirs of his body, is a fee ſimple conditional at the common law; and ſo LITTLETON, and the caſes there cited, ought to be intended: and agreeable hereunto are the reſolutions in LORD COKE, 3. *Rep.* 7. *Heydon's Caſe, and* 9. *Rep.* 105. Whereupon it was adjudged for the plaintiff. Neither an *eſtate tail* nor an *eſtate after poſſibility*, &c. can be created by *cuſtom*.

Co Lit. 60. b. Co. Cop. f. 48. Moor, 188. 358. 637. 1. Lev. 136. Raym. 164. Sid. 314. Cro. Eliz. 717. 907. 3. Co. 8. Lit. f. 73. 1. Inſt. 60. Carth. 22. Poſt. 83.

Richard

Case 5. Richard Hodges, Adminiſtrator of Thomas Hodges *againſt* Thomas Moyſe and John Scriven.

An action for an eſcape from an arreſt by proceſs out of an inferior court need not ſhew by what authority the inferior court was held; for in this caſe the ſtyle of the court is but inducement to the action.

Cro. Jac. 384. 313. 532. 8. Co. 133. Moor, 849. Co. Lit. 303. 2. Vent. 100. Lut. 918. 1. Lev. 85. 1. Lev. 81. 3. Lev 243. 404. 1. Show. 48. 6. Mod. 72. 1. Term Rep. 351.

ACTION UPON THE CASE. Whereas the plaintiff, in ſuch a court of *pypowders* held at *Glouceſter ſecundum conſuetudinem civitatis illius*, brought an action of debt of two hundred pounds againſt *William Hodges*, and thereupon the ſaid *William Hodges*, by due proceſs of the ſaid court, was arreſted, and under cuſtody of the defendants, ſheriffs of *Glouceſter*, according to the cuſtom there, until he ſhall find bail; that they permitted him to go at large, ſo as he hath concealed himſelf, and not anſwered him his debt. Upon not guilty pleaded, and found for the plaintiff, it was now moved in arreſt of judgment, that this action lies not.

FIRST, Becauſe it is not alledged that the court is there held at *Glouceſter* by cuſtom or charter, and then it is clear they hold court without authority, and their proceſs idle, and the defendants not chargeable.

SECONDLY, Becauſe a court of *pypowders* hath no authority to hold pleas but for contracts or batteries in markets and fairs, and not for debts: and to that purpoſe were cited 8. *Co.* 73. and 8. *Co.* 133. a. *Turnor's Caſe.*

THIRDLY, In pleading a recovery in an inferior court, it ought to ſhew by what authority the court is held, whether by patent or preſcription; for otherwiſe they had no authority, and the recovery void.

And ALL THE JUDGES conceived, that the court being ſtiled "a Court of Pypowders" (which is a court incident to fairs and markets, and for cauſes only ariſing within them), ſhall not be intended a court unleſs it be ſhewn to be held by charter or preſcription; and that the ſheriff, who is to take advantage thereby (he being an officer of the court and arreſting the party), ought to ſhew it: as ſtewards when they make any certificates out of inferior courts, ought to ſhew therein how the ſaid courts are holden, for they know beſt their own authority; and the omiſſion thereof is juſt cauſe to reverſe and annul all their proceedings: but otherwiſe it is in the caſe of a ſtranger, as here, where the ſtyle of the court is but an inducement to his action.

The *iſſue roll* may be amended in clerical miſtakes by the *imparlance roll*, if it make no alteration in the *iſſue* or the *verdict*.

Poſt. 92. Cowp. 407. 425.

And theſe words, "*ſecundum conſuetudinem civitatis*," being in the imparlance roll, THE COURT was of opinion, that the omiſſion of them in the *iſſue roll*, whereupon the trial was had, was but *vitium clerici*, and might be amended: for the *imparlance roll* is the principal and guide to the other; and that the addition thereof would not alter either the iſſue or verdict. And accordingly it was amended and adjudged for the plaintiff. *Vide* 13. *Edw.* 4. *pl.* 8.

Dougl. 115. 136. 877. 730. 4 Term Rep. 782. 3. Term Rep. 349. 749.

Baldry

Baldry *againſt* Packard.

CASE 6.

Trinity Term, 2. *Car.* 1. *Roll* 617.

On coſts taxed in the ſpiritual court, if the party appeal, and then a pardon come out, and the former ſentence is afterwards annulled with coſts to the appellant, the coſts given on the appeal are not diſcharged by the pardon. Ante, 9. Poſt. 68. 114. 199. Cro. Jac. 149. 335. 3. Inſt. 238. 2. Roll. Rep. 178. Parker, 280. 2. Hawk. P. C. 556. 558.

PROHIBITION. Whereas the plaintiff ſued him before the commiſſary of the biſhop of *Norwich* for defamation, in which ſuit he had ſentence, and ſix pounds aſſeſſed for coſts; and the defendant appealed from the ſaid ſentence to the court of arches: that all this was depending in 1622, and by the general pardon, 21. *Jac.* 1. the offence of the defamatory words was pardoned, which was pleaded in the court of the arches, and that notwithſtanding they proceeded in the appeal, where the firſt ſentence was reverſed; and in that ſuit ſixteen pounds aſſeſſed for coſts to the appellant, where by law they ought not to have proceeded, nor given any coſts. A prohibition was prayed; and it was thereupon demurred.

And after argument at the bar, debated and reſolved by THE COURT, that here was no cauſe of prohibition: for although the pardon hath diſcharged the offence of the defamation *quoad* any puniſhment, to be inflicted by way of penalty or otherwiſe, yet in reſpect of the coſts in the firſt ſuit, which be not diſcharged by the pardon (being aſſeſſed before the day to which the pardon relates, as it is agreed in *Hall's Caſe* (*a*), if they be not duly aſſeſſed, the Court may well proceed in the appeal to diſcharge the party of them; and if they reverſe the firſt ſentence, ſo as it appears the coſts were unduly taxed, and the party unjuſtly vexed, they may well in the appeal aſſeſs coſts; for the pardon doth not extend to ſtop the ſuit commenced in the appeal; nor by reaſon of the pardon had they cauſe to ſurceaſe that ſuit: and although the coſts in the appeal be aſſeſſed after the pardon, yet they are well aſſeſſed, the cauſe of thoſe coſts not being taken away by the pardon. Whereupon conſultation was awarded; but HUTTON, *Juſtice*, doubted hereof: for the pardon diſcharging the offence (which is the principal), he conceived they ought not to have proceeded for the coſts.

(*a*) 5. Co. 51. b.

Gee, Biſhop of Chicheſter, *againſt* Freedland.

CASE 7.

Eaſter Term, 1. *Car.* 1. *Roll* 607.

A grant by a biſhop, &c. of an ancient office with the ancient fees only annexed, if confirmed by the dean and chapter, is not within 32. *Hen.* 8. c. . nor reſtrained by 1. *Eliz.* c. 19. or 13. *Eliz.* c. . but he cannot grant a new office, nor add not warranted 4. Mod. 16.

REPLEVIN upon a diſtreſs taken in *Allingland Park*. Upon demurrer the caſe was, *The biſhop of Chicheſter* was ſeiſed in fee of the ſaid park, *jure epiſcopatus*, and had the office of parkerſhip, which the biſhop granted to the ſaid *Freedland* for life, and alſo granted to him for the execution thereof an annual rent of 3l. 6s 8d *una cum liberatura* of 13s. 4d. by the year, together with paſturage for two horſes in the ſaid park yearly, and the windfalls in the park, with clauſe of diſtreſs for the ſaid rent of 3l. 6s. 8d. and the livery of 13s. 4d. in all the poſſeſſions of the biſhoprick in the ſaid county, which was confirmed by the dean and chapter: and for non-payment of the ſaid rent of 3l. 6s. 8d. the defendant took the diſtreſs; and avers the office and the fee of 3l. 6s. 8d. to be ancient, but doth not make any ſuch averment for the reſidue.

new fees to old offices, except they be *neceſſary*; nor can they grant offices in any manner by uſage. Ante, 16. Poſt. 557.—Bridg. 26. Ley, 71. 1 Co. 58. Pollexf. 134. Cro. Jac. 173. Co. Lit. 44.

The

GEE *againſt* FREELAND.

Poſt. 557. Co. Lit. 44. a. 10. Co. 60. 2. Roll. Ab. 154. 2. Lev. 138. 4. Mod. 16. Carth. 213. 1. Burr. 219. 221. 3. Bac. Ab. 723. Dougl. 573. 3. Com. Dig. 251.

The plaintiff in bar of the avowry confeſſeth the grant, and pleadeth the 1. *Eliz.* c. 19.; and that the ſaid paſturage for two horſes never was granted before; and that the biſhop who made the grant thereof died, &c. and the plaintiff was elected biſhop. Whereupon it was demurred.

The ſole queſtion was, Whether this grant of the office, with the ancient fee of 3l. 6s. 8d. confirmed by the dean and chapter, be good to bind the ſucceſſor, notwithſtanding the 1. *Eliz.* c. 19. or void only for the things added in the grant; or if the addition of thoſe new things ſhall make all the grant void againſt the ſucceſſor?

After argument at the bar, it was argued at the bench, and held by HUTTON and YELVERTON, *Juſtices*, that the grant was good for the office and the ancient fee of 3l. 6s. 8d. being in a ſeveral grant by itſelf, and not conjoined or mixed with the other grants, and then the one may be good and the other void; but if the grant had been of the fee of 5l. where the other fee was only 3l. 6s. 8d. becauſe it is entire in the grant, it would have been void for all: but here the grant for the rent is one by itſelf, and the grant of the paſturage is another, and diſtinct by itſelf, and the one doth not depend upon the other; ſo it may be good for one and void for the other: and although the grant for the paſturage is void againſt the ſucceſſor, yet the rent may be good.

And HUTTON ſaid, that if the biſhop had granted the office and rent for him and his ſucceſſors, and had granted the paſturage only during the time that he ſhould continue biſhop, and ſo had diſtinguiſhed them in his grant, there had been no queſtion, but both had been good: and as he by his expreſs limitation might have limited them, and they ſhould have been good; ſo the law ſhall make conſtruction that the one is good againſt the biſhop himſelf, the other againſt the biſhop and his ſucceſſor: and the one being ill and void againſt the ſucceſſor, ſhall not deſtroy that which is good; for *utile per inutile non vitiatur*: and although the office itſelf is not within the words of the 1. *Eliz.* c. 19, yet it is within the equity thereof. The offices of parkerſhip and ſtewardſhip, and other offices which are of neceſſary uſe for the biſhop, are admitted and allowed to be grantable, although they be new offices and new fees, if they be reaſonable (and of the neceſſity of them, and of the reaſonableneſs of the fees, the Court ſhall adjudge): and therefore in *Hilary* 10. *Jac.* 1. *Rot.* 758. in C. B. in the caſe of *The Biſhop of Ely* (*a*), where the biſhop of *Ely*, the 20th *April* 1. *Eliz.* (which was preſently after the ſtatute), granted the office of the keeping of his houſe and garden, with the fee of 3l. *per annum*, to another for his life, which was afterwards confirmed by the dean and chapter. Although there were not before any ſuch office, yet being a neceſſary office, and the fee reaſonable, it was adjudged good againſt the ſucceſſor, and not reſtrained by the 1. *Eliz.* c. 19. And although it hath been objected, that the livery or fee of 13s. 4d. and the windfalls be not averred to be ancient, yet HUTTON conceived it ſhall be intended they were ancient, when the contrary is not averred;

Dyer, 80. 10. Co. 61. b.

(*a*) Ley, 78. Moor, 98. 2. Brownl. 137. Burr. 222.

eſpecially

eſpecially when nothing is alledged on the other part to be new but the paſturage. And the avowant diſtraining only for the 3l. 6s. 8d. needed not to aver any other to be ancient than the rent which was in queſtion: and if one grant had been of that office and ancient fee of 3l. 6s. 8d. another grant *pro meliore exercitione ejuſdem officii* (and for his better maintenance) of the livery, 13s. 4d. and the paſturage, and windfalls. Theſe being by ſuch ſeveral grants, the firſt ſhould be good, being diſtinct by itſelf, and the other ſhould be void; ſo by conſtruction of the law it ſhall be taken here as ſeveral grants, rather than the grant ſhall be deſtroyed.

See *againſt* FREEDLAND.

Poſt. 62. 280. Dyer, 370. 3. Bac. Abr. 353.

But YELVERTON agreed, that if he had granted the office for life, and had further granted for the executing thereof theſe fees following, *viz.* the rent of 3l. 6s. 8d. the livery or 13s. 4d. the paſturage and windfalls; and ſo put together the ancient rent and new addition, the grant ſhould be void in all, becauſe they be all in one ſentence: but here being in ſeveral ſentences, the one not depending upon the other, it may be good for the one, and void for the other againſt the ſucceſſor. Whereupon they concluded judgment ought to be given for the avowant.

But it was argued by HARVEY and MYSELF, that judgment ought to be given for the plaintiff: for it is agreed on all parts that the 1. *Eliz.* c. 19. was made for the benefit of the ſucceſſor, that his poſſeſſions might not be charged to impoveriſh him; wherefore all eſtates and grants which are to the prejudice of the ſucceſſors are void. And true it is, that grants of ancient offices, with their ancient fees, which are confirmed by the dean and chapter, are made good by the intention and equity of the ſtatute: and that they ſhall have officers reaſonable, with reaſonable fees, although they be not warranted by the words of the ſtatute, it being within the purview, intent, and meaning thereof, as 10. *Co.* 61. *The Biſhop of Sarum's Caſe*; which is the reaſon that a grant of rent or annuity *pro conſilio impendendo* is reſtrained by the intent of the ſtatute, although it be not within the words, becauſe the ſucceſſor is thereby impoveriſhed and prejudiced, as by the books of 22. *Eliz. Dyer*, 370. 10. *Co.* 60. *The Biſhop of Saliſbury's Caſe, the Caſe of Bolton there cited, and* 5. *Co.* 15.; and that grants of ancient offices are taken to be within the intent of the ſtatute, and are to be allowed, appears, becauſe in another ſtatute, made the ſame parliament of 1. *Eliz.* c. 4. ancient offices are coupled with leaſes reſerving the ancient rent made by the biſhop. But although grants of ancient offices may be allowed for neceſſity, yet they ought not to be with a new addition of a new charge upon the ſucceſſor to impoveriſh him; and therefore it ought to be granted as uſually it had been, and not otherwiſe: for it is at his peril who takes ſuch a grant, that he doth not take a new addition or alteration; and therefore if an office uſually granted for one life be granted for two lives, or if it be granted for life, reverſion for life, and confirmed by the dean and chapter, it is void againſt the ſucceſſor, as well for the firſt life

Poſt. 253.

as

GER *againſt* FREEDLAND.

as for the ſecond (*a*), becauſe it is not granted according to the uſual courſe: and although one of the tenants holds it during the life of the biſhop who granted it, yet not being good at the time of the grant, the ſubſequent act ſhall not help it; ſo this addition of the new charge makes the grant void, as in the *Lord Montjoy's Caſe*, 5. *Co.* 4. Leaſe for years of land uſually demiſed, and of other land not demiſed before, reſerving the ancient rent for the land formerly leaſed, and twelvepence for the land not uſually let, which was the full value; yet it was reſolved that the leaſe was not good, by reaſon of that addition. And although it hath been ſaid that the livery and paſturage are diſtinct clauſes, from the firſt grant of the rent, and not depending upon nor conjoined with it, ſo that the rent may ſtand, and for the other it ſhall be void; it was anſwered, that it appears fully they be one entire grant, and not ſeveral: for the rent is granted *una cum liberatura, or thirteen ſhillings fourpence, et una cum paſturagia*; which is a copulative, and one ſentence. *See the Year-Books* 8. *Hen.* 7. 4. *and* 38. *Hen.* 6. 34. *in the Abbeſs of Syon's Caſe.* And for the 13s. 4d. or livery, it is conjoined in one clauſe of diſtreſs, with the rent of 3l. 6s. 8d. ſo as they be but one grant, and upon one conſideration; but if they had been in another clauſe, or that for another conſideration, he had granted the ſaid livery of 13s. 4d. and paſturage, then the grant might ſtand for the one, and be void for the other. And where it hath been objected that the livery and windfalls, although they have not been ſufficiently averred to be the ancient fees, yet may well be ſo intended; foraſmuch as the contrary is not ſhewn on the other ſide. It was anſwered, that the avowant (becauſe he is to make his title) ought to aver the ſeveral things granted to be ancient fees to the office, otherwiſe the averring that the one is ancient doth imply that the other is not ancient; for a plea ſhall be taken moſt ſtrong againſt him who pleadeth it: and in proof thereof *ſee Plowd.* 46. *&* 103. 1. *Co.* 46. *and* 5. *Co.* 9. *Brudenel's Caſe:* and it ſufficeth the plaintiff to alledge that any of them is a new addition; and he needeth not to alledge the reſidue to be new, for then peradventure it would be double. Alſo, for the principal point in the caſe, the additions trench to the prejudice of the ſucceſſors; and this ſtatute hath been always conſtrued to redreſs the miſchief which was at the common law, upon grants confirmed by dean and chapters in charge, or to the prejudice of the ſucceſſor, and to make them void; as appears 5. *Co.* 2. *&* 3. and in *Scambler v. Wats* (*b*), where two offices of ſteward or under-ſteward of a manor, uſually granted ſeverally, with ſeveral fees, were held void for both. Alſo to both offices the ancient fees are appendant, and parcel of them, and ſhall paſs by grant of the office *cum pertinentiis:* but thoſe fees newly added cannot be ſaid appertaining, nor parcel, to be recovered by aſſiſe, as *Webb's Caſe* (*c*), and the Book of *Aſſize* (*d*) proves: therefore the grant, being of more than was anciently granted, was void. And to expound this grant of the office with new fees to be good for all during the time that the grantor is biſhop, and to be afterwards good in part and void in part againſt the ſucceſſor, and ſo to make

Co. Lit. 44. b. 6. Co. 37.

Co. Lit. 303. b. 3. Co. 59.

(*a*) Lamb's Caſe.
(*b*) Cro. Eliz. 636.
(*c*) 8. Co. 49. b.
(*d*) 39. Aſſize, 4.

fractions

fractions of grants, is againſt the expoſition of grants, and againſt all former conſtructions and interpretations of this ſtatute; and therefore they conceived, that this grant was void in all *ab initio quoad* the ſucceſſor, and the plaintiff ought to have judgment.—Court divided (*a*).

See *againſt* FREELAND.

(*a*) Bridg. 32. Ley. 71.

Robert and William Eyres *againſt* the Executrix of Chriſtopher Eyres.

Case 8.

In Chancery.

IN a ſuit in chancery this Caſe was made and referred to THE MASTER OF THE ROLLS, DODERIDGE, JONES, and MYSELF, *Juſtices*, and to SIR JOHN WARD and DOCTOR LEE, *Maſters of the Chancery* and *Civilians*.

A teſtator on his ſick-bed, being aſked if he will give his brothers any thing, ſays, "*I will give* "*them nothing*;" this does not revoke a former will which gave them legacies.

Cro. Jac. 115. 497. Cro. Eliz. 306. 1. Roll. Abr. 615. Moor, 874. Owen, 76. Godb. 33. 1. Sid. 73. 3. Com. Dig. 13. Powel on Deviſes, 533. Cowper, 49. 130. Dougl. 31. 39. 241. 716. 727.

Chriſtopher Eyres the teſtator, 15. *Jac.* 1. made his will in writing, and thereby deviſed legacies to charitable uſes, and to the plaintiffs *Robert* and *William Eyres*, his brothers; to the one, two hundred pounds; and to the other, one thouſand pounds; and divers other legacies to his other kindred; and made his wife executrix, ſaving that he appointed his ſaid two brothers to be conjoined with her, as executors in truſt for his wife, for performance of his will. Afterwards, 22. *Jac.* 1. being ſick, and ſending for *Mr. Damport*, parſon of the pariſh, and for *Mr Stone*, a reader of the *Temple*, they came, and demanded of him, What friend he thought beſt to be his executor, to take care of his funeral and ſee his will performed? and, Whether he truſted any perſon more than his wife? He anſwered, that his wife was the fitteſt perſon, and therefore ſhould be his ſole executrix. Being then moved by *Mr. Stone* to give legacies to his father, brethren, and kindred, he anſwered he would not give or leave them any thing, but he bequeathed to *Lionell Atwood*, his godſon, twenty or thirty ſhillings; and being thereupon requeſted by his wife to give him a greater legacy, he anſwered her, "*Thou knoweſt not what thou* "*doeſt*; *do not wrong thyſelf*; *thirty ſhillings is money in a poor body's* "*purſe*:" and for others he left them to his wife's diſcretion or diſpoſition: and the teſtator did ſpeak theſe words, or the like in effect, "*animo teſtandi et ultimam voluntatem declarandi.*" All this was ſet down in a codicil, and the firſt will and that codicil proved *in communi formâ* (*b*).

Whether this codicil were a revocation of the firſt will for the legacies given to his two brothers, now plaintiffs? was the queſtion.

After divers arguments, as well by the civilians as common lawyers, IT WAS RESOLVED by them all, and ſo certified under their hands, that they conceived it was not a revocation of the ſaid legacies, but they did not certify their reaſons. The principal rea-

(*b*) See ſtat. Frauds, 29. Car. 2. c. 3. ſ. 5. which requires that a will ſhall be ſigned by the deviſor, or by ſome perſon in his preſence and by his expreſs directions, and atteſted and ſubſcribed, in the preſence of the deviſor, by three or four credible witneſſes; and enacts, that no deviſe of lands ſhall be revoked but by writing; or any will of perſonal eſtate, by word of mouth, unleſs it is reduced into writing in the teſtator's life-time, and executed as the act directs.

ſons

R. & W. Eyres *againſt* The Executrix of C. Eyres.

ſons of their ſaid reſolution were, Becauſe there was an abſolute and formal will made in his health, and there being no ſpeech made by him of his former will, nor of the legacies thereby deviſed to his father, brothers, and kindred, nor that he ſeemed to remember his former will: That an anſwer to a doubtful queſtion ſhall not take away the legacies deviſed before; for *non conſtat* what his intent was in uſing thoſe words, for it may be his meaning was not to give more than he had given before, or that he would not give more at that time by that will; and *non conſtat* that he heard all the words when he was moved to give to his father, brethren, and kindred; and he anſwering, "I will not give them any thing," *non conſtat* what he intended by thoſe words: and therefore upon ſuch doubtful ſpeeches to nullify a will adviſedly made without clear or perſpicuous revocation, or words which *tantamount*, ſhall not be permitted. Alſo the civilians affirmed, that there is an expreſs canon, there cannot be a revocation of legacies amongſt children without preciſe mentioning the firſt will and legacies given thereby to the children; and they ſaid, the law is taken to be ſo when he hath not any children, and deviſeth legacies to his brothers, and there doth not appear any cauſe of miſdemeanor to provoke him to revoke his will, nor do his words import any ſuch intention.—So upon theſe opinions THE LORD KEEPER, being aſſiſted with THE MASTER OF THE ROLLS and the ſaid THREE JUSTICES, decreed the ſaid legacies to the brothers, the ſaid codicil not having made any revocation of them.

CASE 9.

Memorandum.

Crew, *C. J.* diſcharged.

Poſt 65. 375.

UPON *Friday*, being the tenth day of *November*, SIR RANDOLPH CREW, *Chief Juſtice* of the king's bench, was diſcharged of that place by writ under the great ſeal, for ſome cauſe of diſpleaſure conceived againſt him, but for what was not generally known (*a*).

(*a*) *Hume* ſays, he was diſcharged as unfit for, and not ſufficiently obſequious to the purpoſes of, the court. 6. Vol. Hiſt. Eng. p. 166.

CASE 10.

Powell and Wife *againſt* Plunket.

In the Exchequer Chamber.

In an action for ſaying "*A. ſtole "my plate,*" the defendant cannot juſtify that he ſpoke the words on a *ſuſpicion* that *A.* was the thief.

Cro. Jac. 600. 2. Eſpin. Dig. 261. 1. Term Rep. 110.

ERROR in the *exchequer chamber* of a judgment in the king's bench, in an action by *Plunket* for theſe words ſpoken by the wife: "*Mr. Plunket* did ſteal *my* plate out of my chamber." The defendants pleaded that they were poſſeſſed of ſuch plate, which was ſtolen out of their chamber, and ſhe, ſuſpecting the plaintiff to have ſtolen it, ſpake thoſe words; and it was demurred thereupon, and adjudged for the plaintiff.

This error was aſſigned, That the declaration was not good; for a *feme covert* cannot have plate, but it is the plate of her huſband; ſo the words are inſenſible and not actionable.

But it was reſolved by ALL THE JUSTICES AND BARONS, that the action well lies; for although ſhe may not have plate, yet it is in

in common ſpeech well known that the wife accounts her huſband's goods her goods, and ſo what ſhe intended by thoſe words is a great ſlander, and the juſtification clearly ill; for ſuſpicion is no good cauſe to juſtify the ſpeaking ſuch words. Whereupon the judgment was affirmed.

POWELL and WIFE *againſt* PLUNKET.

Morris *againſt* Fletcher.

CASE 11.

In the Exchequer Chamber.

ERROR of a judgment in the king's bench in an *aſſumpſit*, where the plaintiff alledged, that in conſideration he would marry the defendant's daughter, the defendant would pay for the wedding apparel; and the plaintiff alledged, that he married the defendant's daughter, and provided for her two gowns and two petticoats; and that the defendant, *licèt ſæpiùs, &c.*

A promiſe, in conſideration of marriage, to pay for the bride's "*wedding apparel*," means apparel ſuitable to her dignity during *the feſtivity of the occaſion*, and not the clothes merely in which the *nuptial ceremony* was performed. 1. Com. Dig. 137.

The defendant demurred upon the declaration; and judgment was given for the plaintiff.

The errors aſſigned were, FIRST, That he ought to pay only for one wedding gown and petticoat which ſhe uſed upon her marriage-day, and not for more; and intire damages being given, the judgment was erroneous.—But ALL THE JUSTICES AND BARONS conceived, that *wedding apparel* is to be taken, according to the common parlance, for apparel to be uſed upon the wedding-day and time of feaſting, which is commonly for ſome days after, according to the dignity of the perſons; and therefore the declaration was held good, and the damages well aſſeſſed.

THE SECOND ERROR aſſigned was, That the defendant appeared by *John Green*, his attorney, *in octabis Hilarii, anno* 22. *Jacobi regis*, whereas the ſaid *John Green* was dead before the day which was alledged to be confeſſed by pleading *in nullo eſt erratum.—Sed non allocatur*; for it is an error aſſigned againſt the record: and although it was ſaid there ought to have been a ſpecial demurrer for that cauſe, yet it was held, that the *in nullo eſt erratum* alledged againſt the demurrer extends to the three errors aſſigned in the writ of error.

It cannot be aſſigned for error, that the attorney on the record died before the day of appearance. Cro. Jac. 11. 355. Stra. 684. 2. Bac. Abr. 220. Dougl. 114, 115.

THE THIRD ERROR was, That the writ of inquiry of damages was awarded returnable *die Lunæ poſt quinden.* HILARII *primo* CAROLI, and the ſheriff returned the inquiſition taken before him 27. *die* JANUARII, which was after the day of the return of the writ, and ſo without authority.—But foraſmuch as it was not aſſigned upon the record, although in truth it was ſo, THE COURT would not take cognizance thereof; and it may be, that *die Lunæ poſt quinden.* HILARII was the 28. or 29. *day of* JANUARY, and then the inquiſition is well taken, and ſo it ſhall be intended; and if not, the Court ſhall not take notice thereof, unleſs it had been aſſigned. Whereupon the judgment was affirmed.

The exchequer chamber will not take cognizance of an error on the record, unleſs it be *aſſigned* as error. 1. Roll. Ab. 525. 1. Sid. 301. Yelv. 35. Cro. Eliz. 210. Cro. Jac. 548. Com. Dig. 522.

Ld. Ray. 354. Stra. 397. 5.

Edward Davie *againſt* John Hawkins.

CASE 12.

In the Exchequer Chamber.

TRESPASS of his cloſe breaking, and depaſturing with his cattle. The defendant juſtifies, For that one *William Birchmore* was ſeiſed in fee of a meſſuage and tenement in *D.* and he

In pleading preſcription, if the *que eſtate* is alledged by miſtake to be in the *plaintiff* inſtead of the *anceſtor*; *Qu.* If this is amendable?

DAVIE *againſt* HAWKINS.

Ante, 25. Poſt. 78. Cro. Jac 435. Co. Lit. 121. b. 1. Lev. 190. Cowp. 425. Dougl. 114. 3. Term Rep. 147.

and all thoſe whoſe eſtate, &c. the ſaid *Edward Davie* had in the ſaid tenement, had uſed common, and ſo miſtakes *Edward Davie* for *William Birchmore*; and that the ſaid *William Birchmore* let thoſe tenements to the defendant, who put in his cattle upon the common.

The plaintiff replies and traverſeth, ABSQUE HOC, That the ſaid WILLIAM BIRCHMORE, *et omnes illi quorum ſtatum prædictus* EDWARDUS *habuit in tenementis, &c.* and ſo miſtakes *Edward* for *William*; and thereupon iſſue joined in the ſame manner, and the verdict found, That the ſaid WILLIAM BIRCHMORE, *et omnes illi quorum tatum idem* EDWARDUS *habuit, non habuerunt communiam prout, &c.* and judgment was given for the plaintiff.

Error thereof was brought in the exchequer chamber, and this matter aſſigned, That it is a vain preſcription, and none ought to preſcribe in the party in whoſe right common is claimed in him or his anceſtors, &c. And to alledge a *que eſtate* in the party is idle and repugnant, and the verdict finding it is void in itſelf; and ſo the judgment given thereupon is erroneous.

But it was moved, that it was but a miſpriſion of the clerk, and the defendant may not take advantage of his own inſufficiency in his plea, and prayed that it might be amended according to the Caſe of *Sir Anthony Cook*, *Dyer*, 260. 11. *Hen.* 7. 2.

SIR JOHN WALTER, *Chief Baron*, YELVERTON, MYSELF, and OTHERS, conceived it could not be amended, becauſe it is in matter of ſubſtance in all the proceedings, and in the verdict, &c. But HUTTON and OTHERS doubted thereof; whereupon the defendant in the writ of error, for his expedition, and that he might proceed *de novo*, moved by MR. TYLOR, his counſel, that it ſhould be reverſed; and ſo, without further argument, it was reverſed.

CASE 13.

Player *againſt* Warn and Dews.

In the Exchequer Chamber.

In *trover* againſt two, the jury may find the defendants ſeverally guilty as to part of the property, and not guilty as to the reſidue. Poſt. 178. 1. Roll. Ab. 217. 2. Roll. Ab. 684. Jones, 242. Carth. 20. Bull. N. P. 94. Cro. Eliz. 860. 2. Bac. Ab. 9. 511. 2. Eſpin. Dig. 117. Dougl. 377. 730. 2. Term Rep. 758. 3. Term Rep. 448.

ACTION of trover and converſion of two thouſand loads of coals. Upon not guilty pleaded, the defendants were found guilty ſeverally for ſeveral loads of coals, and were found ſeverally not guilty for the reſidue, and judgment accordingly, and intire coſts, and one *ideo in miſericordiâ* againſt the defendants, and one *ideo in miſericordiâ* againſt the plaintiff, *pro falſo clamore*.

And thereupon a writ of error was brought in the exchequer chamber, and the error aſſigned, Becauſe the judgment was againſt both the defendants for the ſeveral damages ſeverally: for it was alledged, that ſeveral damages ought not to have been aſſeſſed, but there being a joint trover and converſion laid to their charge, they ought to have been both found guilty, and they ought not to have been divided in the verdict and in the aſſeſſing of damages; and if they might be ſevered, yet the plaintiff ought to have but the damages given againſt one of them, as it is in *Sir John Heydon's Caſe*, 11. *Co.* 5. *b.* 44. *Edw.* 3. 7.

But ALL THE JUSTICES AND BARONS agreed, that the plaintiff ſhould have ſeveral damages; for being found ſeverally guilty of ſeveral parcels converted, he ſhall have judgment accordingly. And it is not like *Sir John Heydon's Caſe*, where there was but one joint

PLAYER *againſt* WARN and LEWS.

joint and ſole treſpaſs of battery, and ſo found; and there, although the damages were ſeverally aſſeſſed, yet the plaintiff ought to take his judgment for damages but of one: but when the treſpaſs is ſeveral, and ſo found, as in this Caſe, *viz.* the one at the one time, and the other at another, although it be contrary to the ſuppoſal of the writ, yet being found by verdict, it ſhall not abate the writ, and the plaintiff ſhall recover according to the verdict, as it is ſaid there in *Heydon's Caſe*: ſo here this being ſeverally found, and the converſion by them ſeverally of ſeveral things, the damages are well aſſeſſed ſeverally, and he ſhall have judgment againſt them ſeverally for damages according to the verdict. And it was ſaid that there were divers precedents in the king's bench and common pleas to that purpoſe.

Poſt. 193. 243. Cro. Jac. 118. Cro. Eliz. 160.

THE SECOND ERROR aſſigned was, That there ought to have been ſeveral judgments *de ideo in miſericordiâ* againſt the defendants, and being otherwiſe it is error.—But againſt that IT WAS ALSO RESOLVED, that there ſhall be one judgment only of *miſericordia* (*a*), although the defendants be ſeverally found guilty; and ſo are the precedents. Whereupon the judgment was affirmed. *Vide* 44. *Edw.* 3. 6. & 9. *Hen.* 6. 12. *Aſſiſes*, 76.

There ſhall be only one judgment *in miſericordiâ*, although defendants are *ſeverally* found guilty. Poſt. 178. 11. Co. 43. a.

(*a*) See 16. & 17. Car. 2. c. 8. & 5. & 6. Will. 3. c. 12. Poſt. 178. note (*a*).

Sir John Bennet *againſt* Doctor Eaſedale.

CASE 14.

AN ASSISE being brought by *Sir John Bennet* for the office of chancellor of the archbiſhop of *York*, the defendant endeavoured to obtain an injunction out of the ſtar chamber to ſtay his the ſaid *Sir John Bennet's* ſuit, he having lately by ſentence and decree there (for bribery and other miſdemeanors in his office of judge of the prerogative court) been fined twenty thouſand pounds, and cenſured to be impriſoned, and made incapable of any office of judicature; by reaſon whereof, being diſabled to hold the office in queſtion, the defendant obtained it, and pretending this aſſiſe was brought by *Sir John Bennet* that he might enjoy the ſaid office contrary to the decree, he therefore prayed to ſtay his proceedings.

A pardon of a ſentence in the ſpiritual court of fine, impriſonment, and deprivation, for bribery in the office of chancellor of a province, diſcharges not only the ſentence but the *conſequent diſabilities*.

Sir John Bennet, thereupon, having day given him to ſhew cauſe why an injunction ſhould not be granted, ſhewed then a pardon from the late king after the ſaid ſentence, wherein was recited all the bribery and offences contained in the ſaid decree, and all penalties and puniſhments by reaſon thereof, and all diſabilities and incapacities, and all things concerning the ſaid ſentence, except the ſaid fine of twenty thouſand pounds.

5. Co. 51. Cro. Jac 335. 2. Bulſt. 182. 3. Inſt. 238. Cro. Eliz. 684. Moor, 916. 2. Hawk. P. C. 633. 4. Bl. Com. 371.

The court of ſtar-chamber thereupon requeſted SIR JOHN WALTER, *Chief Baron*, and SIR FRANCIS HARVEY, third juſtice of the common pleas, to call to them all the juſtices and barons, and to conſider of the ſaid decree and pardon, and to certify their opinions, whether it were fit to permit the proceedings in the aſſiſe or not: and all the juſtices and barons being aſſembled at *Serjeants-inn*, the ſentence and pardon were read before them, and the caſe argued by counſel on both ſides.

And it was reſolved by THE JUSTICES AND BARONS, that this pardon hath taken away all force of the ſentence in the ſtar chamber,

Sir J. Bennet *againſt* Dr. Easedale.

except for the fine of twenty thouſand pounds, and all inabilities are diſcharged thereby, and that the ſentence never took from him the office, but the execution thereof, nor gave authority to place others: but if the archbiſhop, before the pardon and after the ſentence, had appointed him to execute his office, and he durſt not do it, then peradventure the ſaid archbiſhop, for his *non-attendance*, might have ſeized the ſaid office, and have granted it to another; but the ſentence by itſelf cannot take away the office, which is a freehold; and the pardon having taken away all the offences, they therefore conceived it convenient to permit him to proceed with his *aſſiſe*, and, if doubtful, it may be found ſpecially, and ſo receive a judicial hearing.

Poſt. 65.

Co. Litt. 233. b. 9. Co. 50.

Case 15.

Memorandum.

The death of Hobart, C. J. and the promotion of Richardson.

AFTER the death of Sir Henry Hobart, knight and baronet, Chief Juſtice of the common pleas, Sir Richard Hutton ſat as Prime Judge all *Hilary* Term following, and in both the Terms of *Eaſter* and *Trinity* until the laſt day of *Michaelmas* Term, *viz.* 28. *November*, 2. *Car.* 1. when Sir Thomas Richardson was made Chief Juſtice of the ſaid court, and all the writs which iſſued the ſaid *Michaelmas* Term, from *quindena Sancti Martini* to the end thereof, did bear *teſte* as well under the name of the ſaid Sir Richard Hutton as of the ſaid Thomas Richardson,

Hilary

Hilary Term,

2. Car. 1. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*
Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.* } *Juſtices.*
Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Hearn *againſt* Allen.

CASE 1.

Trinity Term, 22. *Jac.* 1. *and Hilary Term*, 1. *Car.* 1. *Roll* 1876.

A deviſe of a houſe "*cum pertinentiis*" will not paſs land at a diſtance, though occupied with the houſe.
Ante, 17.
Poſt. 169. 308.
Hutton, 85.
Bendl. 128.
Moor, 222.
Plowd. 169.
Cro. Eliz. 89. 114.
Cro. Jac. 121. 174.
Co. Lit. 5. 56.
2. Bl. Rep. 728.
3. Com. Dig. 443.
2. Peere Wms. 303. 369.
1. Bro. Ch. Caſ. 331.
2. Term Rep. B. R. 500. 502.

EJECTMENT of two acres of meadow in *Kingham*, of the demiſe of *Anne Keene*, upon the 26. *March*, 22. *Jac.* 1. for ſeven years from *the Purification* before the ejectment.

Upon not guilty pleaded, a ſpecial verdict was found, that one *Richard Keene* was ſeiſed in fee of a meſſuage and of two acres of land in *Chipping Norton*, and of the ſaid two acres of meadow in *Kingham*, and uſed and occupied the ſaid two acres of meadow, being four miles diſtant from the ſaid houſe, together with his lands and tenements in *Chipping Norton*, and held them all in *ſocage*; and being ſo ſeiſed, upon the 20. *May*, 30. *Eliz.* by his will in writing deviſed the ſaid houſe, "*cum omnibus et ſingulis pertinentiis ad inde vel aliquo modo ſpectantibus* THOMÆ KEENE, *filio* "*ſuo, et hæredibus ſuis* IN PERPETUUM; *et pro defectu hæredum præ-*"*dicti* THOMÆ KEENE, to *Anne Keene*, daughter of the ſaid *Richard* "*Keene*, and to her heirs for ever; and for default of the heirs "of the ſaid ANNE KEENE, *tunc prædictum meſſuagium cum perti-*"*nentiis* JOHANNI KEENE, *conſanguineo ſuo, et hæredibus ſuis* IN "PERPETUUM." And the ſaid *Richard Keene* by the ſaid will deviſed "*omnes terras ſuas, et omnia bona ſua mobilia et immobilia*," to *Elizabeth* his wife during her viduity. And the ſaid *Richard Keene* afterwards died, the ſaid *Thomas Keene* being his ſon and heir; and that the ſaid *Elizabeth* entered and was ſeiſed: and the ſaid *Thomas Keene* entered into the ſaid two acres of meadow and diſſeiſed the ſaid *Elizabeth*; and afterwards, upon 12. *December*, 37. *Eliz.* infeoffed thereof *Edward Keene* with warranty againſt him and his heirs: and that *Thomas Keene* died without iſſue, and that the ſaid *Anne*, daughter to the ſaid *Richard Keene*, was his ſiſter and heir; and that afterwards *Edward Keene*, being ſo ſeiſed, deviſed that land to *Anne* his wife for her life, and died; and that the ſaid *Anne Keene* entered, and let to the plaintiff, who entered, and the defendant ejected him; *et ſi ſuper totam materiam, &c.*

This caſe was argued at the bar: FIRST, Whether by this deviſe of *Richard Keene* of the meſſuage *cum pertinentiis*, thoſe two acres of meadow paſſed, being uſed with it?

And ALL THE COURT conceived they did not paſs (*a*), becauſe by the words "*cum pertinentiis*" land paſſeth not, but only ſuch

(*a*) Vide poſt. 169. and ſee *Ewer v. Hodſon*, Moor, 359. that the land did paſs with the houſe. *Sed vide Owen*, 74. and 2. *Ander.* 123. *contra*. *L. C. B. Parker's MSS.*

HEARN *againſt* ALLEN.

things which properly may be pertaining. Otherwiſe it is if it had been "*cum terris pertinentibus*," then that which was uſed to it would have paſſed; but by the bare words *cum pertinentiis*, without other circumſtances to declare his intent, they ſhall never paſs. *Vide Hill v. Grange*, 23. *Hen.* 8. 6.

A deviſe to *A.* and his heirs, and if he die without heir then to *a ſtranger*, paſſes an eſtate *in fee* to *A.*; but a deviſe to *A.* and his heirs, and if he die without heir then to *his ſiſter* in fee, paſſes an eſtate *in tail* only; for the ſiſter being his heir, it appears that the teſtator meant heirs *of his body*.

The SECOND QUESTION was, Admitting they paſs, Whether it be an eſtate-tail in *Thomas* and the remainder in *Anne* (under whom the defendant pretends to claim, as it was affirmed), or a fee ſimple in *Thomas* and the remainder void? For it was agreed, that if the remainder had been limited to a mere ſtranger, the firſt eſtate had been a fee and the remainder void, as it is 19. *Hen.* 8. & 29. *Hen.* 8. *Dyer*, 33. becauſe no intent appears to make an eſtate-tail, but a fee ſimple, by the words, and then the remainder over is void: but here, when it is limited to the brother and his heirs, and, if he die without heir, to his ſiſter, who is his heir, to whom he intended it ſhould go, thoſe words ſhew what heirs he intended, *viz.* heirs of the body; wherefore by his intent an eſtate-tail was to be created.—But in this point RICHARDSON, *Chief Juſtice*, HUTTON, and HARVEY, *Juſtices*, conceived it to be a fee, and not an eſtate-tail, and the remainder to be void; but YELVERTON and MYSELF held the contrary, and that ſuch conſtruction ſhould be made as ſhould make it agree with the intention of the party.

Cro. Jac. 290. 416. 591. Moor, 853. 3. Bulſt. 195. 1. Roll. Abr. 836. Hutt. 85. Com. Rep. 82. Salk. 233. 238. 3. Lev. 71. 1. Peere Wms. 24. Ld. Raym. 568. 2. Eq. Caſ. Abr. 305. 308. 1. Vezey, 89. Dougl. 254. Cowp. 234. 833. 1. Term Rep. 596. 3. Term Rep. 83. 143. 484.

On a deviſe to *A.* and his heirs, with divers remainders over, if *A.* enter and make a feoffment with warranty, the remainders are barred.—Poſt. 156. Co. Lit. 366. Powell on Dev. 238.

But WE ALL AGREED, there was a collateral warranty (*a*) deſcended which barred the remainder, and not a warranty commencing by diſſeiſin, as was objected. *Vide* 10. *Co.* 95. *Seamor's Caſe*.

1. Term Rep. 738.

But becauſe no title is here found at all for the defendant but *primer poſſeſſion*, the matters in law cannot come in iſſue; and therefore, *quâcunque viâ datâ*, judgment ought to be given for the plaintiff; and judgment was given accordingly.

(*a*) See the 4. & 5. Ann. c. 16. and Co. Lit. 373. b. note (2).

CASE 2.

Smith *againſt* Aſhe and his Wife.

In an action againſt huſband and wife, if the huſband be taken upon a *capias* or *exigent*, he ſhall not reverſe the outlawry until the wife appears; or if he ſue a charter of pardon, and a *ſcire facias* upon it, it ſhall not be allowed without the wife.—S.C. Hutton, 86. Cro. Jac. 445. 1. Roll. Abr. 583. 2. Leon. 138. Cro. Eliz. 118. Hob. 179. 6. Mod. 86. 2 Salk. 115. 3. Bac. Abr. 751.

FOR a debt due by the wife before marriage, the huſband was returned "*outlawed*," and the wife "*waived*;" but before the return of the *exigent*, one ELWISE, *an attorney*, procured for the wife a *ſuperſedeas*, ſurmiſing that the ſaid wife had appeared by him as her attorney.

HENDEN now moved, that this appearance of the wife ſhould be received.

And ALL THE COURT conceived, that if upon the *exigent* the ſheriff had returned "*reddidit ſe*," or upon *pluries capias* had returned "*cepi corpus*" for the wife, then her appearance ſhould be entered, but not by attorney as it is here; and the *exigent* ſhould iſſue only againſt the huſband, and *idem dies* ſhould be given to the wife.

But

SMITH *againſt* ASTE and his WIFE.

But when the huſband upon the *exigent* is returned "*outlawed*," then it ſhall be entered "*ales ſans jour*" for the wife, for the proceſs is determined; and if he will purchaſe his pardon, he ſhall not have allowance thereupon in a *ſcire facias*, unleſs he appeared for himſelf and his wife.

But if for the huſband the ſheriff ſhould return "*cepi corpus*" upon a *pluries capias*, and a "*non eſt inventa*" for the wife, yet an *exigent* ſhall iſſue againſt both, becauſe it is intendable the huſband might bring in his wife; but if upon the *exigent* the ſheriff returned "*reddidit ſe*" for the huſband and for the wife, and ſhe is *waived*, the huſband ſhall go *ſine die*.

But in this Caſe, becauſe the *exigent* was returned againſt both, to be outlawed, the *ſuperſedeas*, ſuppoſing the appearance of the wife, is merely idle and void; whereupon it was diſallowed, and the *exigent* appointed to be filled againſt both. *Vide* 40. *Edw.* 3. 34. 43. *Edw.* 3. 18. 14. *Edw.* 3. 1. 3. *Hen.* 6. 14. 34. *Hen.* 6. 29. 14. *Hen.* 6. 14. 10 *Eliz. Dyer*, 271. 11. *Hen.* 4. 71. & 89. 9. *Edw.* 4. 23. 18. *Edw.* 4. 4.

Sir Henry Mildmay's Caſe.

CASE 3.

In the Exchequer Chamber.

An adminiſtrator ſhall not find bail in error on a judgment for a debt of his inteſtate.

Cro. Jac. 135. 350. *Sed vide* 1. Lev. 245. 1. Sid. 368. 2. Keb. 295. 371. Stra. 745. Ld. Raym. 1459. 1. Com. Dig. 481. 2. Com. Dig. 555. 5. Com. Dig. 295. 4. Mod. 7.

SIR HENRY MILDMAY, as adminiſtrator of *Sir Thomas Mildmay*, brings error of a judgment given againſt *him* in debt upon an obligation where *plenè adminiſtravit* was pleaded.

The queſtion now was, Whether it ſhall be allowed without bail upon the ſtatute of 3. *Jac.* 1. c. 8.? becauſe the words of the ſtatute are general, "in every action."

But becauſe the plaintiff brings error only as adminiſtrator, and the judgment againſt him was not for his proper debt or caſe, it was reſolved by ALL THE COURT, that he is out of the intention of the ſtatute, although he be within the words, it being againſt reaſon that he ſhould be put to mainpriſe, and make that his proper debt where he brings only the ſuit as adminiſtrator: whereupon it was ruled accordingly, that the writ of error ſhould be received, and a *ſuperſedeas* awarded for the execution without putting in bail: and ſo WRIGHT, *Clerk of the Errors*, ſaid, was the common practice upon that ſtatute.

See 13. Car. 2. c. 2. ſ. 9. and 16. and 17. Car. 2. c. 8. ſ. 5.

Sir Charles Howard's Caſe.

CASE 4.

In the Exchequer Chamber,

A park of which the king is ſeiſed in fee may be diſparked, and all the deer therein granted over, by letters-patent under the great ſeal: and by ſuch a grant the office of keeper is virtually diſſolved. S. C. Hut. 86. Jones, 151.

UPON a conference of ALL THE JUSTICES AND BARONS in the preſence of SIR JAMES LEY and THE EARL OF MARLBOROUGH *Lord Treaſurer*, who commanded them to be aſſembled, on a Caſe out of the exchequer, upon an information by Engliſh bill againſt *Sir Charles Howard*.

THE KING was ſeiſed in fee of a park called *Putney-moore-clap*, and KING JAMES, by his letters-patents under THE GREAT SEAL, granted *officium cuſtodis* of the ſaid park to *Sir Charles Howard*, HABENDUM to him the ſaid office, "*cum omnibus vadiis, feodis*, wind-fall trees, profits, and commodities thereto belonging, *in tam amplis modo et formâ prout aliquis alius officiarius illud exercens habuit, tenuit,*

SIR CHARLES HOWARD'S CASE.

tenuit, et occupavit, seu gavisus fuit, et etiam pro considerationè prædictâ granted unto him an annual fee of thirty pounds *per annum* issuing out of all his majesty's manors in that county, HABENDUM to him for life."

Afterwards the king which now is, by his letters-patents under THE GREAT SEAL, published his pleasure for disparking the said park, and grants all the deer therein to *Sir Richard Weston*, chancellor of the exchequer, with liberty to take and carry them away &c.

THE ATTORNEY GENERAL argued this Case *for the king*; and MR. ANDREWS, reader of *Lincoln's-inn*, for *Sir Charles Howard*. THE JUSTICES AND BARONS afterwards gave their opinions.

THE FIRST QUESTION was, Whether by these letters-patents the king may dissolve the park? and, If those letters-patents be a dissolving of the park?

THEY ALL AGREED, That the park is well dissolved, and shall no more be accounted a park, all the deer being destroyed; for a park consisteth of *vert* and *venison* and *enclosure*, and if it be determined in any of them, it is a total disparking; and notwithstanding the grant of the office the owner may well dispark it, according to the opinion of *Wyther's Case*, 6. *Edw.* 6. *Dyer*, 71.

If the king grant the office of parker, and afterward destroy the park, the office is virtually extinguished, and all the *casual fees* thereto annexed irrecoverably lost.

THE SECOND QUESTION was, Admitting the park be dissolved, Whether the office of the keeper be determined? and, if determined, Whether *Sir Charles Howard* may have any remedy for the casual fees and profits?

THEY ALL HELD, That the park being dissolved, the office dependent thereunto is determined, and the grantee of the custody thereof hath not any remedy; for it being the will of the owner of the park to dispark it, and to destroy the deer, the custody is then determined, for he cannot be keeper where there is neither deer nor wood, but all destroyed. And although it be true, that an officer who hath the grant of an office for life or years, and is to have the profit of casual fees, as steward, bailiff, or parkership, (as it is in 31. *Hen.* 8. "*grants*" *Broke*, 134. & 34. *Hen.* 8. "*grants*" 93.) cannot be discharged of the office, for then he should not have his casual fees, that is to be understood, that the grantor cannot appoint another where the park or manor always continues, as 18. *Edw.* 4. fol. 9. resolves; but when the park itself is determined and disparked, the office which is appendant thereunto shall be also determined; but so long as the park continues a park, he may not discharge him of the office and make another officer, because he hath that office for his life, and the profits thereof consist in casualties: but the office of a keeper is in respect of the keeping of the park, and his casual profits are in respect of his pains and attendance upon the game, the keeping thereof; and it is to be intended, that at the beginning of that office they were only granted in respect thereof, and in continuance of time they are become appendant to the office, and when the park is destroyed so as there needs not such attendance, then *cessante causâ cessat effectus*: as if one grant the office of steward with all profits of courts, if the manor be destroyed, the office, and with it the casual profits, are determined also; so here the park and liberty of the park being determined, the office is determined in itself.

Co. Lit. 233. 2. Inst. 199. Hob. 41. 43. Cro. Jac. 18. 9. Co. 50. Hutton, 86. 4. Com. Dig. 301. 2 Bl. Com. 38. 416.

THE

THE THIRD QUESTION (admitting the office to be determined), Whether the annual fee of forty pounds, being granted in consideration thereof, iſſuing out of the king's manors in the county of *Surry*, be alſo determined?—And SIR JOHN WALTER, *Chief Baron*, held clearly it was; but ALL THE OTHER JUSTICES AND BARONS diſſented from him in this point only, becauſe it is granted by a diſtinct clauſe, and not out of the park: and although the office be determined, yet becauſe it is not by the act or default of the grantee himſelf, but by the act of the grantor only, they conceived the grantee ſhould enjoy that annuity. *Vide* 5. *Edw.* 4. 8. 7. *Edw.* 4. 22. *Plow.* 457. *Sir Thomas Wroth's Caſe, and* 381. *Sir Henry Nevil's Caſe.*

The grant of a *collateral fee*, as of forty pounds a-year to a parker for life, for the exerciſe of his office, is not determined, though the park be diſcharged, and the office thereby diſſolved.

Hutton, 86. Co. Lit. 233. b.

Ante, 49. Poſt. 280. Cro. Jac. 18.

Sir Gregory Fenner *againſt* Nicholſon and Pasfeild.

CASE 5.

Hilary Term, 22. Jac. 1. Roll 239.

SIR GREGORY FENNER brings a *quare impedit* againſt *Nicholſon* and *Pasfeild*, and the *Biſhop of London*, as ordinary for the church of *Chelmsford*; and ſhews, that *Sir Thomas Mildmay* was ſeiſed, and preſented *Pasfeild*, and let the manor to which the advowſon is appendant to the plaintiff; and that the church became void by the reſignation of *Pasfeild*, by reaſon whereof it belonged to him to preſent.

If A TRAVERSE be taken where there is a full *confeſſion and avoidance*, it makes the plea *double*.

Yelv. 155.

The Biſhop pleaded nothing but as ordinary. *Pasfeild* entitles himſelf to it by preſentation, as to an advowſon in groſs, and traverſeth the appendency; whereupon the plaintiff taketh iſſue. The defendant *Nicholſon* pleaded as *parſon imparſonee* of the preſentation of the king; and, confeſſing the title of *Sir Thomas Mildmay* and the leaſe for years of the manor made to *Sir Gregory Fenner*, pleads over, that the ſaid SIR THOMAS MILDMAY *pro quâdam pecuniæ ſummâ*, betwixt him and one *John Joſſelin*, preſented the ſaid *Pasfeild*, and pleaded the ſtatute 31. *Eliz.* c. 9. (which makes a preſentation upon ſimony, and the inſtitution and induction thereupon, to be void), and that the king ſhould have the title to preſent: ſo by reaſon of this preſentation made by ſimony it is void, and belonged to the king to preſent; who preſented the defendant *Nicholſon*, who was admitted, inſtituted, and inducted; and traverſeth, that the church became void by the reſignation of *Pasfeild*, *prout*, &c.

Poſt. 354.

And thereupon it was demurred, and ſhewn for cauſe, That the traverſe was inſufficient to traverſe matter not traverſable, and that this plea is double (*a*).

HENDEN argued at the bar that this traverſe is ill, becauſe the preſentment is the principal; which being *confeſſed and avoided*, cannot be traverſed: for the avoiding and traverſing make it double; and that being ſpecially ſhewn for cauſe of demurrer, and the other joining in the demurrer, judgment ought to be for the plaintiff (*b*): alſo the pleading of the ſimony, that "*pro quâdam pecuniæ ſummâ*" it was agreed, &c. and not ſhewing for what ſum, is uncertain and ill.

(*a*) By 4. & 5. Ann. c. 16. the plaintiff in replevin, and the defendant in any action, may, with the leave of the Court, plead as many pleas as he ſhall think fit. *Vide* Barnes, 357. Forteſ. 336. 1. Wilſ. 223. and 5. Com. Dig. 67.

(*b*) And. 1. 1. Leon. 44. 80. 3. Mod. 319. Yelv. 151. 2. Vent. 213. Lut. 1558. 2. Saund. 50. Carth. 166.

But

FENNER *againſt* NICHOLSON and PASFEILD.

But ALL THE COURT conceived that the plea was good; for the plea maketh the traverſe but argumentative that he might not reſign; and being alledged that the church is void *per mortem vel reſignationem*, or otherwiſe, it ought to be confeſſed or traverſed, for that is the cauſe of his preſentment; and the iſſue ought to have been taken, *ſi vacavit per mortem, vel deprivationem vel reſignationem*: for the preſentation, admiſſion, and inſtitution, are but conducing to the reſignation; and the reſignation or avoidance is the chiefeſt matter. In *Say's Caſe* (*a*), there was ſuch an iſſue, *ſi vacavit per mortem*; and in *Hilary Term*, in *Paſchall's Caſe* (*b*), in a *quare impedit* ſimony was alledged, and preſentment by the king by reaſon thereof, &c.; and traverſeth the vacancy *per mortem*: and in *Michaelmas Term*, 2. *Car.* 1. a preſentment for ſimony was alledged to be made, and concluded with a traverſe of the vacancy *per mortem*; and ſo are the precedents, that the iſſue may be entered upon the avoidance, *viz.* if it be pleaded *per mortem, deprivationem, vel reſignationem*, as the principal matter traverſable, according to the precedents in the *Bk. of Ent.* 485. 490. 511. Whereupon judgment by conſent was reſolved to be given for the plaintiff againſt *Paſfeild*, he relinquiſhing his plea, and confeſſing the action; and upon the demurrer judgment ſhould be given for the defendant: and ſo it was, and releaſe of errors on both ſides.

Poſt. 105.

(*a*) Dyer, 376. Co. Ent. 499. (*b*) 15. Jac. 1. Roll 2091.

CASE 6.

Fotherby's Caſe.

If the ordinary, after he has granted letters of adminiſtration, libel the adminiſtrator to make diſtribution of the inteſtate's effects to his children or kindred, a *prohibition* ſhall go. Poſt. 202.

PROHIBITION by *Fotherby*, adminiſtrator of *Fotherby*, for ſuing in the eccleſiaſtical court againſt him as adminiſtrator, to make diſtribution of ſome part of the perſonal eſtate to the ſiſter and heir of the inteſtate; ſurmiſing, that by the law of the land, the adminiſtration being committed to the inteſtate's wife, the ordinary hath no authority to intermeddle with making diſtribution of the goods of the inteſtate to the children or kindred.

Hetley, 48. 68. Allen, 56. 9. Co. 39. b. Palm. 517. March. 13. Poſt. 201. Hob. 83. 197. 1. Lev. 157. 186. 233. 305. 1. Sid. 179. 372. Carth. 125. Ray. 93. 499. 1. Mod. 211. 1. Peere Will. 8. Strange, 911. 1. Com. Dig. 252. 4. Com. Dig. 512.

SERJEANT HENDEN and SERJEANT FINCH ſtrongly urged that ſuch prohibition is not allowable: for when one dies inteſtate, the uſual courſe hath been for the ordinary, after all debts paid, to give order for the diſtribution of one part of the goods to the wife, and another part to the children; and if he hath not any children, then to his kindred.

But HUTTON, *Juſtice*, ſaid, it is not reaſonable, nor ſtands with law, that the ordinary ſhould aſſume ſuch a power: for by the ſtatute of 31. *Edw.* 3. c. 11. the ordinary is compellable to commit adminiſtration (*a*); and the adminiſtrator is only chargeable, and the ordinary hath no more to meddle with it; and it would be miſchievous if the ordinary ſhould compel him to make diſtribution; for peradventure he may be chargeable with actions of debts unknown after good accompt; alſo the adminiſtrator, by the adminiſtration of the goods committed to him, hath an abſolute intereſt in them, with which the ordinary hath not to meddle: and although at the civil law the adminiſtrator was accountable, as ſervant to the ordinary, and might be diſcharged by him, and a repeal might have been of the letters of adminiſtration at the ordinary's pleaſure, yet at this day, eſpecially after the ſtatute of

(*a*) By mandamus, Strange, 552. 892.

21. *Hen.* 8.

21. *Hen.* 8. c. . the adminiſtration being duly committed by the ordinary, cannot now be repealed; and if there be a ſuit to have it repealed, a prohibition lies; and divers prohibitions in ſuch caſes have been granted. As to the caſe in queſtion, he ſaid, he knew when he was at the bar, and ſince he came to the bench, that divers prohibitions had been granted, where the adminiſtrator was ſued to make diſtribution; as in *Clerk's Caſe*, and *Mich.* 20. *Jac.* 1. *Roll* 2196. *Jane Swyft*, adminiſtratrix of *Hugh Swyft*, ſhe being bound in an obligation of two hundred pounds to the ordinary to make true adminiſtration, exhibit a true inventory, make a perfect accompt, and to diſtribute the ſurpluſage after all debts and legacies paid, at the appointment of the ordinary; and being ſued before *Dr. Seaman*, commiſſary to the biſhop of *Glouceſter*, to make diſtribution, moved for a prohibition; which was granted upon good advice by award of the court. So hereupon a prohibition was likewiſe granted in *Trin.* 14. *Jac.* 1.

Fotherby's Case. R. 37. 141. Hetl. 68. Poſt. 201.

Hobart, Warberton, Winch, and Hutton, reſolved, in the Caſe of *Tooker v. Loan* (*a*), that a prohibition ſhould be granted to the delegates in an appeal of ſuch ſentence from the ordinary, for adjudging to make diſtribution (*b*), and *Hilary*, 9. *Jac.* 1. *Roll* 1608. for *Watts*.

(*a*) Hobart, 191. See alſo Levane's Caſe. Poſt. 201.
(*b*) See the ſtat. of diſtributions, 22. & 23. Car. 2. c. 10. Raym. 499. 1. Peere Will. 7. 2. Bac. Abr. 411. 414. 29. Car. 2. c. 3. ſ. 35.

Sydley *againſt* Dr. Mundford.

Case 7.

In the Exchequer Chamber.

Error in the exchequer chamber of a judgment in the king's bench. The caſe was, That *Dr. Mundford* brought treſpaſs for three loads of oats taken at *Tewing* 20th *Sept.* 20. *Jac.* 1. The defendant juſtifies, becauſe the place where, &c. is parcel of a copyhold in *Tewing*, and makes title to it, and juſtifies for *damage feſant*. The plaintiff ſhews, that long before the time when, *et prædicto tempore quo, &c.* he was parſon of *Tewing*, and that the place where is within his rectory and the titheable places thereof; and that the defendant being a copyholder there, the 20th *Sept.* 20. *Jac.* 1. let it to one *Hawkes*, to have it from year to year, *quamdiu ambabus partibus placeret*; and that *Hawkes* entered, and plowed, ſowed, took the crop, and ſet out the ſaid oats for his tithes; and the defendant *de injuriâ ſuâ propriâ* took the oats, *prædicto tempore quo, &c.* The defendant maintaining his bar traverſed the leaſe; and it was found for the plaintiff, and judgment for him.

Treſpass for oats. Juſtification, *damage feſant*. Rep. *tempore quo et diu antea* he was parſon and took for tithes. This is ſufficiently certain, though he does not ſhew himſelf *parſon* when they were ſevered. Ante, 6. Poſt. 80. 195. 3. Bulſt. 336. Cro. Jac. 67. 86. Wilſ. 123. Barnes, 163. Burr. 772. Cowp. 682. Dougl. 158.

And now the error was aſſigned, For that he alledged he was parſon *tempore quo, &c.* and at the time of the treſpaſs ſuppoſed *ac diu antea*, but doth not ſay that at the time of the ſeverance of the corn he was parſon, for it ſhall not be intended without ſhewing it, but rather that he was parſon at the time of the treſpaſs, and not at the time of the ſeverance; and then he makes not a ſufficient title to them.

But all the Juſtices and Barons conceived it was well enough, and ſhall be intended, by all the circumſtances, that he was parſon at the time of the ſeverance; for it is ſaid, "*antea et tempore quo fuit* parson, *et adhuc eſt, &c.*;" and eſpecially the defendant having

SYDLEY *against* DR. MUNDFORD.

having admitted that he was parſon, and the ſaid tithes due to him, and making traverſe to the leaſe, which was an idle traverſe, and therefore good cauſe of demurrer: and the replication is good; for being pleaded that "*diu antea et tempore quo, &c.*" he was parſon, it is certainly enough intended he was parſon at the time of the ſeverance, as well as at the time of the taking. Whereupon judgment was affirmed, notwithſtanding THE YEAR-BOOK 35. *Hen.* 6. *fol.* 48. which was much inſiſted upon.

Cro. Jac. 67.

CASE 8.

The Earl of Lincoln's Caſe.

In the Star Chamber.

Peers of the realm in all criminal caſes muſt in courts of equity put in their anſwer upon oath; and where they are witneſſes between party and party, they ought to be ſworn.

Hutton, 87. Jones, 132. 154. 1. Bl. Com. 402. 2. Salk. 512. 1. Peere Will. 146. Ord. Chan. 40. 2. Eq. Ca. Ab. 14. pl. 4. Mitford's Pleadings, 9.

MEMORANDUM, That upon the 13th *February* 1626, in the court of ſtar chamber, all the juſtices of both benches being there (except JUSTICE DODERIDGE), and all the barons of the exchequer, and a very great aſſembly of the lords, VIZ. The Lord Keeper, Lord Treaſurer, Lord Preſident of the Council, The Duke of *Buckingham*, The Earl of *Pembroke*, Lord Steward, The Earl of *Suffolk*, Earl of *Carliſle*, Earl of *Holland*, The Lord Chancellor of *Scotland*, The Lord *Conwey* principal ſecretary, The Lord *Carlton*, and divers others of the privy council;

IT WAS MOVED, Whereas *Sir Henry Fines*, *knight*, had exhibited his bill in the ſtar chamber againſt *the Earl of Lincoln* for divers riots and other miſdemeanors, and *the Earl of Lincoln* had taken a commiſſion forth to put in his anſwer *upon oath* in the country, and he offered before them his anſwer *upon his honour*, but would not put it in upon oath, becauſe he was a peer of the realm; which matter being now reported by the commiſſioners, it was now moved by the KING'S SOLICITOR to have the reſolution of the Court.

And it was held by ALL THE JUSTICES, who delivered their opinions *ſeriatim*, that the lords, in caſes criminal, eſpecially where the king is party, ought to put in their anſwer upon oath; and in all caſes where they are to be witneſſes between party and party, they ought to be ſworn. And the Lord Keeper ſaid, *quòd in judicio non creditur niſi juratis*, and that he had cauſed precedents to be ſearched, and had found divers ſince the firſt of queen *Elizabeth*, wherein peers of the realm being impleaded in chancery, or ſtar chamber, or court of wards, have been always ſworn: and he ſaid, when a peer affirms any thing which is not true upon his honour, there is not any remedy; but if he affirms that which is falſe upon his oath, there is remedy by the 5. *Eliz.* c 9. againſt perjury: wherefore THEY ALL RESOLVED that *the Earl of Lincoln* ought to be ſworn. All the lords and counſellors were of the ſame opinion, which they delivered *ſeriatim*, *nullo contradicente*, becauſe it is *juramentum purgationis*, and not *promiſſionis*: and princes are ſworn to all their leagues and confederacies, which is called *juramentum confirmationis*; neither is it any diminution to the ſaid earl's honour to be ſworn about that which he would not ſhould be put upon his honour.

Sutton's

Sutton's Caſe.

CASE 9.

SUTTON, chancellor of the biſhop of *Glouceſter*, moved for a prohibition to ſtay a ſuit before the commiſſioners eccleſiaſtical, for that articles were there exhibited againſt him, becauſe he being a divine, and having a rectory with cure of ſouls, and never brought up in the ſcience of the civil or canon laws, and not having any intelligence in them, took upon him the office of the chancellor of the biſhop of *Glouceſter:* whereas there were divers canons and eccleſiaſtical conſtitutions, and alſo directions from the late king *James*, and from the king that now is, that none ſhould be admitted to have thoſe offices of chancellorſhip to a biſhop, unleſs he were inſtructed and learned in the canon and civil laws, becauſe divers cauſes triable in the ſaid courts are of weight; and the judges there ought to have knowledge of the laws, otherwiſe they cannot adminiſter right to the king's ſubjects.

The Court will not grant a prohibition to ſtay a ſuit in the eccleſiaſtical court againſt the chancellor of a biſhop, to examine whether he be ſkilled in the civil law, although the biſhop had granted him the office for life. Ante, 56. Jones, 393. 2. Roll. Ab. 286. Latch 228. Noy, 91. Godb. 390. 4. Mod. 27. Ray. 88. Fitzg. 190. 273.

Upon theſe articles *Mr. Sutton* being examined, confeſſed that he was a divine, and had a ſpiritual living, and that the office of the chancellorſhip of the biſhop is grantable for life, and that ſuch a biſhop of *Glouceſter* had granted to him the office for his life, which the dean and chapter had confirmed, whereby he had a freehold therein, and ought to enjoy it during his life; and that notwithſtanding this anſwer they intended to proceed againſt him: wherefore he prayed to have prohibition.

But THE COURT denied it; for if he be a perſon unſkilful in thoſe laws, and by law ought not to enjoy it, they may peradventure examine that: for although a lay perſon, by his admiſſion and inſtitution to a benefice, hath a freehold, yet he may be ſued in the ſpiritual court, and deprived for that cauſe; but if he hath wrong, he may peradventure by *aſſiſe* try it. Therefore a prohibition was denied.

Memorandum.

CASE 10.

IN this Term SIR NICHOLAS HYDE, of the *Middle-Temple*, was made the king's ſerjeant, and by ſpecial commiſſion directed to SIR JAMES LEY, lord treaſurer of *England* (becauſe the Lord Keeper was ſick), being made by writ Chief Juſtice of the king's bench, he was there ſworn in the place of SIR RANDOLPH CREW, who was the laſt Term diſcharged of his place.

HYDE appointed Chief Juſtice of the king's bench. Ante, 52. Poſt. 225. 375.

Eaſter

Eaſter Term.

3. Car. 1. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Memorandum.

CASE 1.

THE firſt day of this Term two new ſerjeants were made, *viz.* SIR ROBERT BERKLEY, of the *Middle Temple*, and ROWLEY WARD, of the ſame houſe: they had their writs in the vacation, returnable *quindena Paſchæ*, and appeared in chancery the firſt day of this Term: and upon the *Thurſday* ſe'nnight following, ALL THE JUSTICES AND BARONS being aſſembled at *Serjeants-Inn*, in *Fleet-ſtreet*, the new ſerjeants came in their party-coloured robes, with the marſhal and warden of the *Fleet* before them, and ſo preſented themſelves before the juſtices; and becauſe it was againſt courſe, for they ought to have come in their robes of *brown-blue*, ALIAS *black-coloured*, they were ſent back again. Alſo they came into the ſaid hall, each of them having his ſervant bearing his *ſcarlet hood*, his *quoif*, and *cap* before him; but that alſo being againſt courſe, for every ſervant ought immediately to follow, and not precede his ſerjeant, they were directed to go back again, and return in their gowns of *brown-blue*, and then (without any ſpeech made to them by the Chief Juſtice, as the uſual manner is) they recited their counts, and had their writs read. They directed their ſpeech to the chief juſtice of the common pleas, and then went and kneeled down before the two chief juſtices, who putting on their *quoifs* and *ſcarlet hoods*, they then returned to their chambers, and from thence went in their party-coloured robes to *Weſtminſter*, and were each of them preſented at the common pleas by two ancient ſerjeants, and gave rings with this inſcription, "*Lege Deus et Rex*;" and they made their feaſts at *Serjeants-Inn*, in *Fleet-ſtreet*, at which the Lord Treaſurer, the Earl of *Mancheſter*, Preſident of the Council, and all the Juſtices, Barons, Serjeants, the King's Council, and prothonotaries were preſent, and none others. The ſaid SIR ROBERT BERKLEY was the ſame Term ſworn the king's ſerjeant at law.

The ceremonies to be obſerved on a call of ſerjeants.

Poſt. 72.

Poſt. 85.

The Caſe of Lord Morley and the Biſhop of Chicheſter.

CASE 2.

In the Star Chamber.

IN this Term all the juſtices were aſſembled at *Serjeants-Inn*, upon a caſe referred out of THE STAR CHAMBER betwixt *Lord Morley* and *the Biſhop of Chicheſter*, which was thus:

If a bill in equity againſt two defendants be referred for ſcandal againſt one of them, and after a pardon of all contempts, the bill be taken off the file and diſmiſſed as ſcandalous with coſts, the coſts are diſcharged by the pardon. Ante, 9. 47. Poſt. 199.

Lord

LORD MORLEY *againſt* THE BISHOP of CHICHESTER.

5. Co. 51. Cro. Jac. 335. 2. Roll. Abr. 178. 304. Yelv. 99. 2. Hawk. P. C. 558.

Lord Morley and *Sir Richard Molineux* exhibited a bill in the ſtar-chamber, in *Michaelmas Term*, 19. *Jac.* 1. againſt *the Biſhop of Chicheſter* and *James Hutchinſon*, which was ſcandalous, and a libel againſt the biſhop. In the 21. *Jac.* 1. came the general pardon, wherein all offences (not treaſon) were pardoned. Afterwards in the 22. *Jac.* 1. there was a motion in the ſaid court for the biſhop, that the bill againſt him being ſcandalous might be taken off the file; whereupon it was ordered accordingly, unleſs cauſe were ſhewn before ſuch a day: when no cauſe being ſhewn, it was ordered to be taken off the file, and the plaintiff to be fined one hundred pounds to the king; and one hundred pounds damages were given to the biſhop.

The plaintiff now prayed to have benefit of the pardon, and to be diſcharged of coſts to the party; and thereupon cited the caſe of *Beverley v. Poyer* (*a*), where, upon ſuch bill, fine being given to the king againſt the one defendant, and the other diſmiſſed, and fine againſt the plaintiff, and damages of 500 marks aſſeſſed to the defendant againſt the plaintiff, becauſe the bill was ſcandalous and a libel as againſt him, although the bill was before the general pardon, and the ſentence after, yet it was reſolved by advice of all the juſtices, that the pardon ſhall relate and diſcharge the plaintiff's offence, and that the ſentence againſt him, for the fine and coſts, was taken away, becauſe it was not a bill depending, *quoad* the ſaid defendant againſt the plaintiff; but *quoad* the other defendant the ſentence was good, being for an offence whereof the bill is depending, which is excepted within the pardon; therefore the fine was well aſſeſſed as to him; but *quoad* the fine againſt the plaintiff, the pardon takes hold and remitteth it.

So here IT WAS RESOLVED, that the fine and coſts are diſcharged by reaſon of the pardon, and that there is not any difference betwixt this and *Beverley's Caſe*, although that day was here given to ſhew cauſe; for he hath not any means to plead the pardon. Wherefore they all reſolved, that this general pardon intervening betwixt the bill and the ſentence for the fine and coſts, the plaintiff ought to be diſcharged of the ſaid fine and coſts by reaſon thereof.

(*a*) Hutton, 79.

CASE 3.

Langham *againſt* the Wife of John Bewett.

Upon a *hab. cor.* returning that the defendant was detained for debt as *a feme ſole merchant*, the Court may receive extrinſic evidence that ſhe was not *ſuch a trader*, in order to admit her to bail as a *feme covert*.

Moor, 135. Heil. 9. Mod. Rep. 26. 3. Burr. 1376. 1776. 1. Com. Dig. 544. 4. Term Rep. 361.

UPON an *habeas corpus* to *London* to remove the body *cum cauſâ* of the wife of *Bewett*, it was returned, that an action of debt was brought againſt her and her huſband in *London*, as a *feme ſole merchant*, for wares bought by the ſaid wife, wherein the huſband is only named for conformity, and by the cuſtom the execution ſhould be only againſt her. Upon this returned before the LORD RICHARDSON, he took bail *de bene eſſe*, becauſe it was affirmed that the *feme* merchandized only for her huſband in buying wines (her huſband being a vintner); in which caſe it ſeemeth ſhe is out of the cuſtom, and ſo ought not to be charged. And it was moved to have the direction of the Court what ſhould be done, for the *feme* continued in priſon.

The

The cuſtom of *London* was read, "That a *feme ſole merchant* is "where the *feme* trades by herſelf in one trade, with which her "huſband doth not meddle, and buys and ſells in that trade," there the *feme* ſhall be ſued, and the huſband named only for conformity; and if judgment be given againſt him, execution ſhall be only againſt the *feme*.

LANGHAM *againſt* The WIFE of BEWETT.

RICHARDSON and YELVERTON conceived, that ſhe ſhould be diſcharged; for when it appears by examination that ſhe uſed the trade which her huſband uſed, ſhe in law is but ſervant to her huſband, and the wares coming to his uſe, he, by intendment, is to be ſued: and this caſe is out of the cuſtom; for it ſeemeth this cuſtom intendeth only where the *feme* uſeth one trade, and the huſband another, and doth not meddle with his wife's trade, nor the wife with the huſband's; but when ſhe deals in her huſband's trade, and in none other, it ſhall be accounted her huſband's trade, and then the huſband ought to be ſued, and not the wife.

Judg. Ref. 89. 4. Term Rep. 361.

But HUTTON, HARVEY, and MYSELF were of another opinion, foraſmuch as the writ had returned, that ſhe was ſued in *London* as a *feme ſole merchant*, according to the cuſtom of *London*; and therefore this is ſuch an action and cauſe wherewith this court ought not to meddle, nor take cognizance, nor can give the party relief, although he hath good cauſe of ſuit: for in *London* they are judges of their own cuſtoms, and by intendment will proceed in their courts there according to their cuſtoms, and not otherwiſe; and therefore we ought not to take away their privileges, nor remove the action out of that court, where we cannot give remedy in this; and it is a foreign ſurmiſe, that it appears not in the return the *feme* uſed the ſame trade her huſband uſed.

Alſo they conceived, although ſhe uſed the ſame trade that her huſband at any time uſed, as in this caſe is pretended, yet becauſe at that time of the contract (as was affirmed) the huſband did not meddle with the trade, but ſhe only uſed it, and the huſband was then in the king's ſervice beyond ſeas as a ſoldier (*a*), and although he now returned bare and needy, yet as he did not meddle with the trade (as was affirmed by oath), and theſe contracts were made in his abſence (as was likewiſe teſtified by oath), it is no reaſon to accept bail where an action cannot be grounded upon that contract in this court, but to remand the cauſe, according to THE YEAR-BOOKS of 1. *Edw.* 4. *pl.* 6. 35. *Hen.* 6. *pl.* 28. 9. *Edw.* 4. *pl.* 35. 21. *Hen.* 7. *pl.* 18.

A wife may carry on her huſband's buſineſs as a *feme ſole trader*.

3. Term Rep. 618.

Afterwards it was agreed and compounded, and nothing done.

Vide Mich. 29. *Hen.* 6. *Roll* 344. *Geppings v. Harding* (*b*). This caſe pleaded, and iſſue taken, Whether ſhe were a *feme ſole merchant* in treſpaſs for goods taken by her delivery? and found for the plaintiff, that ſhe was not a *feme ſole merchant*: ſo that every *feme ſole* who trades in *London* is not a *merchant*.

(*a*) 2. Inſt. 713. 3. Peere Will. 37.
(*b*) See 1. Bl. Rep. 571. 3. Burr. 1778.

where it is ſaid that this caſe is not to be found in the Year-Books. 1. Com. Dig. 544.

Case 4.

March *againſt* Culpepper and Anne his Wife.

Hilary Term, 2. Car. 1. Roll .

In an *aſſumpſit* on a promiſe, that if the plaintiff would ſubmit his accounts to *A B.* the defendant would pay as much as ſhould be found due from his wife as *executrix* of her former huſband, is good; for the ſubmiſſion of the accounts to inſpection of the arbitrator is ſufficient conſideration.

S. C. Hetley, 1. 8. 11. Cro. Eliz. 67. 150. 1. Bac. Ab. 170, 171. 2. Term Rep. 479.

ASSUMPSIT. Whereas one *Hugh Goddard* was indebted to the plaintiff in 107l. for wares ſold to him by the plaintiff, and died inteſtate, the ſaid 107l. being due, and not paid, and adminiſtration committed to the wife of the defendant, for which 107l. the plaintiff intended to ſue the ſaid wife as adminiſtratrix; but the huſband of the ſaid ANNE, *dum ſola fuit*, deſiring to know the true debt which the ſaid *Hugh*, her former huſband, at the time of his death owed to the plaintiff, the 30th *July*, 1. *Car.* 1. required the plaintiff, *quòd quidem* WILLIHELMUS WHITEMAN, EGIDIUS DIGGS, *et* HUGO OWEN, *ſuperviderent compotum* betwixt the plaintiff and the inteſtate of and concerning the ſaid wares ſold, &c. *ut ſuam certitudinem cognoſceret*; whereto the plaintiff aſſented: and then they finding, *ſuper viſum compoti*, that the ſaid *Hugh* the inteſtate, at the time of his death, was indebted to the plaintiff in the ſaid ſum of 107l. gave notice thereof to the defendant *Anne* the ſame day, &c.; and the ſaid *Anne* knowing that the inteſtate at the time of his death was indebted to the plaintiff in the ſaid ſum, the ſaid ANNE, *dum ſola fuit*, in conſideration of the premiſes, *adtunc et ibidem*, SCILICET, the ſaid 30th *July*, 1. *Car.* 1. promiſed the plaintiff to pay to him the ſaid 107l. in this manner, *viz.* part thereof before the end of *Michaelmas Term* then next enſuing, and the reſidue within reaſonable time after: and alledges in fact, that the ſaid *Michaelmas Term* began at *Reading*, and ended ſuch a day, and that neither the ſaid ANNE, *dum ſola fuit*, nor the huſband and wife during the *coverture*, had paid the ſaid 107l. or any part thereof.

The defendant pleaded to iſſue; and it was found for the plaintiff: and alledged in arreſt of judgment, that here is not any ſufficient conſideration ſhewn to ground the action; for there is not any matter of profit or advantage to the defendant, nor any matter of charge or trouble to the plaintiff, and without one of them there is not any conſideration to charge the defendant, and to make him liable to pay it out of his own proper goods; for the promiſe of the wife, *dum ſola fuit*, ſhall not tie him without valuable conſideration.

Poſt. 77. 260. 273. 409.

But LORD RICHARDSON, HUTTON, HARVEY, and YELVERTON conceived, he did a thing at her requeſt which he needed not, *viz.* ſhew his accompts to her three friends appointed by her; which is a trouble to him, and more than he needed to have done. And it ſeemeth the conſideration is ſufficient, and the breach of promiſe made thereupon juſt cauſe of ſuit, eſpecially ſhe promiſing to pay at two days; which implies that in the *interim* the plaintiff ſhould forbear his ſuit; which being found by verdict, is a good conſideration. And thereupon the plaintiff had judgment.

Memorandum.

Memorandum.

Case 5.

A call of ſerjeants.

AFTER the end of this Term, two other new ſerjeants were made, *viz.* ALIFF, of *Lincoln's-inn*, and ROBERT CALLICE, of *Gray's-inn*. Their writs were returnable *tres ſeptimanas* PASCHÆ; they appeared in chancery *quarto die poſt* the ſame return; kept their feaſts at *Serjeant's-inn* in *Fleet-ſtreet*; obſerved the ſame form in their preſentation as was before; and gave rings, *quorum inſcriptio fuit*, "REGIS ORACULA LEGES."

Ante, 67.

The Soldier's Caſe.

Case 6.

A ſoldier *inliſted*, who departs from the *conductor* as he is leading him to the ſea-ſide, is guilty of felony; for although the ſtatutes make a departure in ſuch caſe from *the captain* felony, yet for the public ſervice and good of the realm *a conductor* ſhall be conſidered in this caſe as *captain*.

S. C. Hutt. 134. Co. Lit. 71. 3. Inſt. 86. 6. Co. 27. 4. Bac. Abr. 652.

THIS Caſe, by his majeſty's command, was propounded to all the judges to be by them reſolved: Whereas one who had received preſs-money to ſerve the king in his wars, was enrolled, had taken pay, and was delivered amongſt the other ſoldiers to A CONDUCTOR to be brought to the ſea-ſide, did afterward withdraw himſelf, and ran away without licence: Whether this departure be felony, &c.?

Upon conference and debate hereof, it was conceived by HUTTON, YELVERTON, and MYSELF, That it was not felony, either by the ſtatutes of 7. *Hen.* 7. c. 1. or by 3. *Hen.* 8. c. 1. which are the ſole material ſtatutes to this point; as it is reſolved 6. *Co.* 27. *the Caſe of Soldiers*, that thoſe ſtatutes mention only departure from their captain, who is a ſpecial named perſon, and of ſpecial note and place, and the ſoldier who departs ought to be delivered to him as his captain, and he ought to be a captain in war; and A CONDUCTOR is ſuch a perſon only who is hired to guide them in the way, or part of the way, to their captain; and ſuch conductors are new officers, for in ancient time ſoldiers were taken and preſſed by the captains themſelves: therefore this not being a departure from his captain, is not felony.

But it was reſolved by HIDE and RICHARDSON, *Chief Juſtices*, WALTER, *Chief Baron*, DODERIDGE, HARVEY, JONES, and WHITLOCK, *Juſtices*, and DENHAM and TREVOR, *Barons of the Exchequer*, That ſuch departure without licence from his conductor was felony: for they held, that a conductor is a captain within the intention and meaning of the ſtatutes of 7. *Hen* 7. c. 1. & 3. *Hen.* 8. c. 1. which ſtatutes, although they be penal, yet being made for the public ſervice and good of the king and realm, may very well be taken liberally according to the intent of the makers; for a captain is but a conductor, leader, or chieftain, and ſo is a conductor, for he is one to command and lead them the way they are to go; and the ſtatute of 7. *Hen.* 7. c. 1. doth not ſpeak of captains, but of lieutenants, which in common acceptation is ſomewhat more than a captain, and yet no doubt but a captain is within the ſaid ſtatute; and by the ſame reaſon a conductor, who is ſomewhat leſs than a captain, may be a captain within the ſtatute of 3. *Hen.* 8. c. 1. which ſpeaks of captains and petty captains, and a conductor is a petty captain: *conductor dicitur à conducendo*, which is to hire or preſs, or to guide, direct, or go along together in the way; and *conductores militum* are preſſers of ſoldiers;

therefore a conductor is a captain within theſe ſtatutes, and a departure from him without licence is felony (*a*).

(*a*) See the Mutiny Act.

ANOTHER POINT was moved, How and before whom this felony ſhould be tried? becauſe it is a new law which makes a new felony, and it appoints, that it ought to be tried before the juſtices of peace at their ſeſſions. Whereupon a doubt aroſe, Whether juſtices of aſſiſe, and juſtices of *oyer* and *terminer*, may by their commiſſion try it or not? And herein was not any reſolution given; but the greater opinion was, that the juſtices of *oyer* and *terminer* may try it by their commiſſion.

Trinity

Trinity Term,

3. Car. 1. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Wilcocks *againſt* Bradell.

CASE 1.

PROHIBITION by *Wilcocks* againſt *Jane Bradell*, the wife of *John Bradell*, principal of *St. Mary Hall* in *Oxford*, and *Chriſtian*, the daughter of the ſaid *John Bradell*, to ſtay their ſuits in the vice-chancellor's court of *Oxford*, for that whereas—*Jane Bradell* had libelled againſt him in the vice-chancellor's court of *Oxford* for calling her "*bawd*" and "*old bawd*," which is termed the action of injury;—and *Chriſtian* for theſe words, "*ſcurvy* "*whore*" and "*jade*," and that he did ſtrike her.—For ſtaying of theſe ſuits, ſentence being given againſt him in both, *Wilcocks* prays to have ſeveral prohibitions.

The wife and daughter of *a principal* at *Oxford* may ſue *a ſcholar* in the court of the vice-chancellor there for aſſault and defamation, for *they* have no remedy againſt him in any other court, and therefore he cannot diſclaim this privilege. *Vide* poſt. 87.

And now the agent for the univerſity moved for a conſultation, and ſhewed the charters of the univerſity of the 14. *Rich.* 2. and the 14. *Hen.* 8. whereby is granted to them, that they may inquire of all treſpaſſes, injuries, and of all pleas and quarrels, and of all other crimes and matters (except pleas of franktenement), where a ſcholar or their ſervants or miniſters "*ſunt una partium, et cog-* "*nitionem et correctionem inde habend. ſecundum eorum ſtatuta vel con-* "*ſuetudines, vel ſecundum legem regni noſtri* ANGLIÆ, *ad voluntatem* "*cancellarii*; *ita quòd juſticiarii de banco regis ſive de communi banco,* "*vel juſticiarii de aſſiſis, non ſe intromittant. Et ſi iidem juſticiarii in-* "*quirere, ſeu aliqualiter cognoſcere, ſeu intromittere perſtrinxerint, tunc* "*ſuper certificationem, notificationem, ſeu ſignificationem cancellarii uni-* "*verſitatis ſeu ejus commiſſarii, inquiſitionem ſeu cognitionem hujuſmodi* "*ſuperſedeant, nec partes ad reſpondendum coram eis ponant, ſed pars* "*illa coram cancellario ſeu commiſſario ſuo ſolummodo caſtigatur et pu-* "*niatur in formâ prædictâ*;" and that theſe charters were confirmed by act of parliament, 13. *Eliz.* c. 29. (and ſo were recited *verbatim* in the act): and becauſe *Wilcocks* was a ſcholar and maſter of arts of the ſaid univerſity, it was prayed that the cauſe might be remanded.

Year-Book, 8. *Hen.* 4. pl. 20. 2. Inſt. 548. 4. Inſt. 227. Hetley, 25. Jenk. Cent. 2. pl. 88. Hardres, 189. 504, 505. Godbolt, 201. Hale's Com. Law, 33. 2. Ld. Raym. 836. 1364. 10. Mod. 126. 2. Vent. 363. Hob. 87. 1. Bl. C. Intro. ii. 3. Bl. Com. 84. 300. Wood's Inſt. 521. 5. Bac. Abr. 328. 1. Vern. 212. 2. Vern. 484.

It was much debated at the bar and bench, for that the parties plaintiffs were women, who were not any perſons privileged there, and the defendant who is the ſcholar doth not deſire that privilege, but would oppoſe it, and prayeth theſe prohibitions.

Stra. 810. 2. Will. 406. 5. Com. Dig. 611. B. R. H. 241. 5. Bac. Abr. 327.

WILCOCKS *against* BRADELL.

But THE COURT agreed, forasmuch as the charters are, that the university shall have cognizance of those pleas where "*una* "*pars est scholaris*;" and so the plaintiffs being thereby inforced to sue there, therefore the cause should be remanded.

CASE 2.

Jerome's Case.

An attorney struck off the roll and imprisoned for suing a *capias* in debt without an *original*.

20. *Hen.* 6. pl. 37. 2. Inst. 215. Litt. Rep. 46. 4. Inst. 101. Moor, 882. 1. Brown. 44. Sti. P. Reg. 3. 1. Bac. Abr. 192. 3. Term Rep. 275. Cowp. 829.

MEMORANDUM this Term. Because one *Jerome*, an attorney, had prosecuted three several actions of debt, every one of them being above the sum of *forty pounds*, and so finable to the king; and procured judgments to be entered upon them, no original writs being sued forth, he himself having received the charges for suing the originals, as well for the fine to the king as for the said writs (as he himself confessed upon his examination); and because it was done voluntarily, in deceit of the king for his fines, and against his oath as attorney that he should not practise any deceit, it was ordered, that he should be put out of the roll of attornies, and be cast over the bar and committed to the *Fleet*; but no fine was imposed upon him, *quia pauper*; and in THE YEAR-BOOK, 20. *Hen.* 6. *fol.* 37. there is the like judgment: and it was forthwith put in execution accordingly.

1. Com. Dig. 447, 448. Dougl. 114.

If an attorney falsify or forge a writ, he shall be struck off the roll and fined.

Cro. Jac. 694. 4. Mod. 367. 1. Burr. 20.

A PRECEDENT was shewn, which was entered in the roll 30. *Eliz.* that one *Osbaston*, an attorney, for falsifying and forging a writ of *capias*, was ordered to be put out of the roll, and cast over the bar, and fined five pounds, and sworn never to practise after as attorney, and to be brought to the king's bench bar and exchequer, that knowledge might be taken of him that he was not to practise any longer as attorney in those courts.

2. Burr. 797. 1. Com. Dig. 447. 2. Hawk. 219.

See St. *West.* 1. 3. Edw. 1. c. 29. and 3. Jac. 1. c. 7. 12. Geo. 1. c. 29.

CASE 3.

Turner *against* Palmer.

A quare impedit may be amended before appearance, by the original instructions given by the plaintiff's attorney to the cursitor.

2. Roll Abr. 198. 8. Co. 159. 2. Vent. 46. 1. Lev. 2. Barnes, 4. 12. 16. 27. 1. Com. Dig. 317. 1. Bac. Abr. 97. 2. Hawk. P. C. 278. Cowp. 841. Dougl. 115. 135. 378.

QUARE IMPEDIT *ad præsentandum ad ecclesiam de* WATTON; and before appearance of the defendant it was moved, that the writ might be amended, for his title of presentation is to the *vicarage* of the said church, and not to the *parsonage*. And because it was in a writ original, and in point of substance, THE COURT much doubted whether it should be amended; for it is clear the writ was mistaken; for the words "*ad præsentandum ad ecclesiam*" always intend right of *advowson of the parsonage*, but when the title is to the vicarage only, there is a special writ *ad præsentandum ad vicariam*. *Fit. Nat. Brev.* 32. & *Dyer*, 323. But because GAY, *the attorney*, gave a note to the cursitor of the chancery to draw a writ *ad præsentandum ad vicariam ecclesiæ de* WATTON, and because it is a peremptory action in a *quare impedit*, the six months being past, the party being a purchaser of the advowson, and that misprision happening by the fault of the clerk, who did not pursue his master's direction, it was ordered that it should be amended; and the cursitor, being present in court, was appointed to amend it.

1. Term Rep. 782. 3. Term Rep. 349. 749.

Whiteacres

Whiteacres *againſt* Hamkinſon.

CASE 4.

Hilary Term, 2. *Car.* 1. *Roll* .

DEBT upon an obligation with condition to pay a hundred pounds. The defendant pleads, That one *John Woodcock* was bound with him jointly and ſeverally in the ſaid bond, and that the plaintiff recovered againſt *him*, and had him in execution upon a *capias ad ſatisfaciendum*, and that ſuch a ſheriff *liberè & voluntariè* permitted him to go at large; *et hoc*, &c.

It was hereupon demurred.

And being moved, it was, without argument, ADJUDGED for the plaintiff; for an execution againſt one is no bar but that he may ſue the other; for execution without ſatisfaction is not any bar: and although he eſcaped by the voluntary permiſſion of the ſheriff, as is pleaded, ſo as the plaintiff is entitled to an action againſt the ſheriff, yet that ſhall not deprive him of his remedy againſt the other obligor; but if he had pleaded, that the ſheriff ſuffered him to go at large by the licence or command of the plaintiff, it had been a diſcharge, and might have been pleaded in bar.

1. Com. Dig. 115. 3. Com. Dig. 310.

If one obligor be in execution and the ſheriff ſuffer him to eſcape, the obligee may ſue the other obligor, notwithſtanding he has remedy againſt the ſheriff.

Poſt. 206. 153. 240. 255. 5. Co. 86. b. Hobart, 60. Co. Eliz. 478. 555. 573. 850. Cro. Jac. 143. 338. 532. Moor, 459.

Thorowgood and Jaques *againſt* Collins.

CASE 5.

TRESPASS. Upon demurrer the caſe was, That one *Dobſon* deviſed the land in queſtion to the two plaintiffs, and to four other perſons, HABENDUM to them, their heirs and aſſigns, *in perpetuum, et quòd eorum omnes haberent æqualem et conſimilem partem*, ANGLICE, "part and part-like, and every of them to have as much "as the other." The queſtion was, Whether this were a joint-tenancy or tenancy in common? The defendant claimed by deviſe under one of the deviſees.—And, without argument, IT WAS ADJUDGED, that by reaſon of theſe words, "part and part-like," and being deviſed "to them, their heirs and aſſigns," and being in a will, it was a tenancy in common, and not a joint-tenancy, and that the defendant had good title. Wherefore it was adjudged for the defendant.

A deviſe to two and their heirs, *part and part alike*, creates *a tenancy in common*, and not *a joint eſtate*.

Herley, 29. Dyer, 25. 326. Co. Lit. 190. b. Cro. Jac. 259. Cro. Eliz. 330. 443. 696. 1. Leon. 258. 3. Co. 39. b. Moor, 594.

2. Roll. 89. 2. And. 17. 3. Com. Dig. 34. 2. Atk. 441. 1. Vezey, 165. 3. Burr. 1881. 1895. See the Caſe of Fiſher *v.* Wigg, 1. Peere Wms. 14. and 3. Bac. Abr. 196. Cowp. 352. 657. 1. Term Rep. 596.

Eve *againſt* Wright.

CASE 6.

Hilary Term, 1. *Car.* 1. *Roll* 732.

REPLEVIN. The defendant made cognizance as bailiff to *Lord Peters*, becauſe *Lord Peters* was ſeiſed in fee of the manor of *Writtle*, and he and all thoſe whoſe eſtate, &c. have had within the ſaid manor A LEET of all the reſiants in *Writtle ſemel in anno*, VIZ. upon the *Monday* next after the Feaſt of *Pentecoſt tenendum*, and all amercements in that leet for not coming; and that the plaintiff was amerced, and for the ſaid amercement the diſtreſs was taken; and iſſue being joined upon this preſcription, the jury at the bar found this ſpecial verdict:

A verdict in *replevin* finding the ſpecial matter as the *avowant* had pleaded, is good; and ſubſequent matter ſhall be rejected as ſurpluſage.

EVE *against* WRIGHT.

That *Lord Peters* and all they whoſe eſtates, &c. have had a leet, &c. *verbatim ut ſupra*. But further they find, that the warden and ſcholars of *New College* in *Oxford* are ſeiſed in fee of the manor of the rectory of *Writtle*, called *Romans-fee* in *Writtle*; and that they and all thoſe whoſe, &c. have had A VIEW OF FRANK-PLEDGE of all the inhabitants and reſiants within the ſaid manor called ROMANS-FEE, *ſemel in anno, in Feſto Commemorationis* PAULI *tenendum ſecundum antiquam conſuetudinem ibidem*, as to their manor of *Romans* belonging; and that the plaintiff was a reſiant within the ſaid manor; and if *ſuper totam materiam*, &c.

There may be a ſuperior leet at which the reſiants of an inferior leet are bound to attend.

13. *Edw.* 1. pl. 7. 21. *Edw.* 3. pl. 18. 18. *Hen.* 6. pl. 12. Cowp. 14. 2.

The point intended was, Becauſe the plaintiff was a reſiant within the leet of *The College*, Whether he may be ſaid a reſiant within another leet, and ſo chargeable to two leets? and, Whether one may have a grand leet of all the inhabitants within a vill, and another may have an inferior leet of ſome of the inhabitants within the ſame vill, ſo as they ſhall be ſubject to two leets? was the queſtion.

Co. Ent. 506. Hetley, 21. Cro. Jac. 551. 584. 1. Roll. Abr. 541. 4. Com. Dig. 160. Hawk. P. C. 114.

If the jury find a *direct verdict*, uncertain or contradictory matter afterwards added ſhall be rejected as ſurpluſage.

But ALL THE COURT held, that foraſmuch as the verdict had found the iſſue *verbatim* to be preciſely for the avowant as he pleaded, the finding of the other matter after is not material, but idle; and judgment to be given for the avowant. So the matter in law was never debated by the juſtices.

—Poſt. 130. 174. 212. 2. Roll. Abr. 605. 1. Leon. 92. Moor, 431. Co. Lit. 227. Hob. 54. Ray. 204. Cro. Eliz. 480. 2. Saund. 308. Savil, 312. 3. Leon. 80. 2. Sid. 27. 96. B. R. H. 252. Dougl. 667. 1. Term Rep. 141. Wood's Inſt. 481. 2. Hawk. c. 11. ſ. 3.

CASE 7.

Chapman *againſt* Chapman.

In the Exchequer Chamber.

Trinity Term, 2. Car. 1. Roll 483.

To A PLEA of performance to DEBT on bond for breach of covenants, A REPLICATION of non-payment of rent, without ſtating *a demand*, is good; for a denial of ſuch *demand* would have been a *departure* from the *plea*.

1. Roll. Abr. 443. 460. Hutt 90. 2. Lut. 609. Hob. 8. Cro. Eliz. 829. Co. Lit. 304. Cro. Jac. 145. 423 Plowd. 105. 5. Com. Dig. 430.

ERROR in the exchequer chamber of a judgment in debt in the king's bench, upon an obligation of two hundred pounds, conditioned, "that if the obligor ſhould at all times well and truly "pay, perform, and keep all and ſingular the rents, covenants, "grants, articles, payments, and agreements, which on his part are "and ought to be performed," compriſed in ſuch an indenture of leaſe, &c. that then, &c. The defendant pleaded generally performance of all covenants, &c. The plaintiff replies, and ſhews a breach for non-payment of the rent at ſuch a time, but doth not ſhew any demand of that rent; and thereupon the defendant demurred; and it was adjudged for the plaintiff.

And now the defendant aſſigneth for error, That foraſmuch as the condition of the bond is general for the performance of all the covenants, and not particularized for the payment of the rent, the rent is not payable without demand, and therefore the breach was not well aſſigned; and for that THE YEAR-BOOKS of 14. *Edw.* 4. *pl.* 4. & 22. *Hen.* 6. *pl.* 52. were cited.

But ALL THE JUSTICES AND BARONS held, That the judgment is well given; for he pleading performance of the payments, covenants, and agreements, it ſhall be intended he had really performed them, and ſo had paid all the rents; and when the plaintiff replies, that he hath not paid ſuch a rent, he need not alledge a demand, for the defendant

fendant may not ſay it was not demanded, for then it ſhould be a departure from his plea; wherefore they held the replication was good: and yet the obligation being general for performance of covenants, doth not alter the nature of the rent, but that it ought to be demanded; and upon this reaſon a caſe was cited of *Specot v. Sheets* (*a*) in the common pleas. And the judgment was affirmed.

CHAPMAN *againſt* CHAPMAN.

(*a*) Cro. Eliz. 818. Hutton, 91. Moor, 636.

Rolte *againſt* Sharp.

CASE 8.

In the Exchequer Chamber.

ERROR in the exchequer chamber of a judgment given in an *aſſumpſit* in the king's bench, where the plaintiff declared, That he, at the requeſt of *A. S.* made a gown and petticoat for the ſaid *A. S.* which lay by him, becauſe they were not paid for; that the defendant, in conſideration the plaintiff would deliver to the ſaid *A. S.* the ſaid gown and petticoat, aſſumed and promiſed to the plaintiff that he would pay as much as the gown and petticoat were reaſonably worth; alledging in fact, that he upon that promiſe delivered the ſaid gown and petticoat to the ſaid *A. S.* and that then it was reaſonably worth fifteen pounds, and that he had requeſted the defendant to pay it, and he had not paid it.

Delivery of goods to a third perſon at the defendant's requeſt is a good conſideration; and an allegation that he promiſed to pay *tantum quantum meruit*, with an averment *quod meruit tantum*, is ſufficiently certain, without ſaying *to whom*.

The defendant pleads *non aſſumpſit*; and found againſt him, and judgment for the plaintiff.

And now error aſſigned, That the declaration is inſufficient, becauſe it is alledged he promiſed to pay, and he doth not ſhew to whom he ſhould pay it; ſo it is uncertain to whom the payment ſhould be made.

Latch. 152. 272. Noy, 83. Poph. 181. Ante, 19. 70. Cro. Jac. 263. 570. Poſt. 160. 273. 573. Cro. Eliz. 143. 149. 848. 1. Sid. 306. Raym. 123. 2. Wilſ. 309. 1. Burr. 373. 1. Com. Dig. p. 137. 142. 152.

SECONDLY, There is not any conſideration for the defendant to be charged; for he hath not any benefit by the delivery to *A. S.*

THIRDLY, He doth not alledge that he delivered them to *A. S.* to her own proper uſe; and then the delivery to her is not material.

FOURTHLY, The promiſe to pay for them *tantum quantum*, &c. is inſufficient.

But ALL THE JUSTICES held that the declaration is good: for as to the firſt, that he promiſed to the plaintiff to pay, although he doth not ſay *to whom* he ſhould pay, it is good enough; for it ſhall be intended to the plaintiff, and to pay to another is idle; for the plaintiff made the clothes, and the promiſe was *to him to pay*; therefore it ſhall be intended to be *paid to him*; as in 4. *Edw.* 4. obligation *ſolvendum* to the obligor is idle, and ſhall be in law a good obligation to the obligee.

TO THE SECOND, That the conſideration is good; for the delivery of thoſe garments out of his hands at the defendant's requeſt is a good and valuable conſideration.

TO THE THIRD, That the delivery to *A. S.* at his requeſt is a very good conſideration (*a*).

TO THE FOURTH, It is the uſual way to lay down in certainty, *viz.* that he ſhould pay for it *tantum quantum meruit*, &c. and then to aver what it is reaſonably worth; which being the common courſe, and always allowed, judgment was therefore affirmed.

(*a*) See 29. Car. 2. c. 3.

Purcaſe

Case 9.

Purcase *against* Jegon.

In the Exchequer Chamber.

In debt, plea of payment on an impossible day; verdict of non-payment on that day *nor any time before*, is good. Ante, 25. 54. S. C. Noy, 85. S.C. Jones, 140. S.C. Latch. 158. R. 586. 2. Co. 5. a. Co. Lit. 41. b. 2. Bac. Ab. 104. 4. Bac. Ab. 59, 60. 128. Cowp. 671. 2. Term Rep. 28. 3. Term Rep. 531.

DEBT upon an obligation of two hundred pounds, conditioned for the payment of one hundred pounds upon the one-and-thirtieth day of *September* following. The defendant pleaded payment the said one-and thirtieth day, according to the condition of the bond; and issue thereupon, and found that he did not pay; and costs and damages assessed, and judgment given for the plaintiff; and error brought in the exchequer-chamber.

The error assigned was, Because the verdict being upon the payment on the one-and-thirtieth day of *September*, is an idle and void issue, and so a void verdict; and then the judgment being given upon the verdict, is ill: but the plea of the defendant is ill, and judgment ought to have been given upon that and not upon the verdict.

Sed non allocatur: for there being no such day as the one-and-thirtieth day of *September*, and the jury finding that the money was not paid upon that day, nor any time before, they find in effect it was never paid; which is a good verdict, and judgment well given thereupon. And therefore judgment was affirmed.

Michaelmas

3. Car. 1. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*
Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.* } *Juſtices.*
Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Clapham's Caſe.

CASE 1.

If the judge of an inferior court is not an utter barriſter of three years ſtanding, proceedings ſhall be ſtayed upon the deliſery of *hab. cor.* notwithſtanding iſſue is joined within the time limited by the 21. *Jac.* 1. c. 23.

2. Jones, 209. 1. Salk. 148. 352. Carth. 60. 3. Mod. 85. Palmer, 403. 3. Com. Dig. 480. 2. Hawk. P. C. ch. 27. ſ. 62. 64. 1. Burr. 515. in Practice, 177.

NOTE. Upon information to the Court that a *habeas corpus* being awarded to the court of *Guildford* in *Surry* to remove a cauſe there depending, they notwithſtanding proceeded. Upon examination it appeared, that the writ was delivered after the iſſue joined in DEBT, *viz. per minas* pleaded, and that the iſſue was joined more than ſix weeks after the action brought, ſo as by the 21. *Jac.* 1. c. 23. ſ. 2. (*a*) the judge might refuſe.

IT WAS RESOLVED by all the Court, becauſe it was in an action of debt upon an obligation of two hundred pounds not made within that vill, that the ſtatute doth not extend to this caſe; for that provides againſt the removing by *habeas corpus* ſuch actions only where the cauſe of ſuit is properly ariſing within the vill.

SECONDLY, Foraſmuch as the proceedings were before one who was town-clerk and attorney of the common pleas, and not an utter barriſter (as he ought to be by an expreſs proviſo in the ſtatute, and ſuch utter barriſter ought to be there preſent, and cannot have a deputy, but ſuch one as is an utter barriſter and preſent at the trial), IT WAS RESOLVED, that after the *habeas corpus* delivered the ſaid proceedings were ill, and not warranted by the ſtatute; and their proceedings, after a *habeas corpus*, to trial and judgment were alſo void.

point. See alſo 2. Burr. 758. Tidd's

If an inferior court proceed after *habeas corpus*, a *ſuperſedeas* ſhall iſſue.

3. Mod. 85. 1. Term Rep. 279.

Whereupon a *ſuperſedeas* was awarded: and the judges of the king's bench, being informed thereof, agreed, that their courſe in the king's bench was to diſallow proceedings in an inferior court after an *habeas corpus* delivered, unleſs it were a cauſe ariſing in the vill or corporation.

3. Com. Dig. 450. 2. Hawk. P. C. 418. 1.

(*a*) See 21. Jac. 1. c. 23. 12. Geo. 1. c. 29. ſ. 3. and 19. Geo. 3. c. 70. ſ. 6.

Oxford *againſt* Rivett.

CASE 2.

Trinity Term, 2. *Car.* 1. *Roll* 1684.

To *ſcire facias* againſt an adminiſtratrix, the defendant pleads

SCIRE FACIAS againſt *Katherine Rivett*, adminiſtratrix of *John Rivett*, upon a judgment againſt the defendant as adminiſtratrix, for a debt due by the inteſtate.

plene adminiſtravit at a particular time. The plaintiff replies, that at that time "*devaſtavit* diverſa *bona*," without naming the adminiſtratrix. The defendant rejoins "*quòd ipſe non devaſtavit*, &c." On iſſue joined, and verdict for the defendant, ſhe ſhall have judgment. Poſt. 92, 93.—S. C. Hetl. 33. S. C. Lit. Rep. 52. 1. Roll. Abr. 908. 910. Co. Lit. 89. b. Dougl. 452. 1. Term Rep. 188.

The

OXFORD *againſt* RIVETT.

The defendant pleaded, that the inteſtate made his will, and thereby conſtituted *Edward Rivett* his ſon within age his executor, and that adminiſtration was committed to her *durante minore ætate*, and that he on ſuch a day attained the age of ſeventeen years, and then refuſed to be executor, and the adminiſtration was committed to *Sir Hugh Wirrell*; and that at the time that *Edward Rivett* came to the age of ſeventeen years, ſhe had fully adminiſtered all the eſtate which came to her hands, &c.

The plaintiff replies, that at the time the ſaid *Edward* came to his full age, *devaſtavit diverſa bona* of the inteſtate's, *unde ſatisfeciſſe potuit* to him his due debt.

The defendant rejoins, *quòd ipſa non devaſtavit aliqua bonorum, &c. et de hoc ponit, &c. et prædictus quærens ſimiliter.*

Upon this it was tried, and found for the defendant.

It was now alledged in arreſt of judgment, that here is not any iſſue joined, and therefore it is a miſ-trial not aided by any ſtatute: for in the replication he doth not alledge that KATHERINA *devaſtavit*, but that *devaſtavit*; and *Katherina* is not named but by a parentheſis.

RICHARDSON, *Chief Juſtice*, HUTTON, and HARVEY, conceived it ſhould be conſtrued, that KATHERINA *devaſtavit*, for ſhe was the adminiſtratrix; and the other by intendment could not make the devaſtation. And the replication is, that *devaſtavit diverſa bona, unde ſatisfeciſſe potuit* the plaintiff of his debt, which is a ſtrong intendment that ſhe *devaſtavit*; and it ſhall be a good intendment to aid it after verdict. And ſhe in the rejoinder ſaith, *quòd ipſa* KATHERINA *non devaſtavit, et de hoc ponit ſe ſuper patriam, et querens ſimiliter:* and hereupon a verdict was given, which the plaintiff ſhall not avoid by an exception to his own replication.

Ante, 64. Cro. Jac. 67. 4. Bac. Ab. 57.

But YELVERTON and I held, that an intendment ſhall not make a replication good; and an iſſue cannot be joined but where there is a direct affirmative and negative: but here is no direct affirmative *quòd devaſtavit*; and the Court ſhall not intend it to be *Katherine* more than another; and it may be that *Edward Rivett* the executor *non devaſtavit:* but *quâcunque viâ datâ*, the Court by intendment ſhall not aid it where there is no iſſue joined; and the verdict cannot help it (*a*).

Co. Lit. 126. a.

(*a*) It was móved again on another day in the Term, and judgment given for the defendant. Poſt. 93, 94.

CASE 3.

Fawkeners *againſt* Bellingham.

Michaelmas Term, 22. *Jac.* 1. *Roll* 490. SUSSEX.

The ſtatute of 32. *Hen.* 8. c. 2. limiting an *avowry* or *conuſance* for rent, ſuit, or ſervice, to a poſſeſſion of forty years next before making the avowry, &c. does not extend to a *new rent* created by act of parliament. *Vide* S. C. poſt. 214. Hetley, 28. 36. Jones, 233. Lit. Rep. 42. 2. Vernon, 255. 2. Inſt. 95. Co. Lit. 115. a. Moor, 44. 3. Keb. 366. 392. Vent. 265. 2. Vernon, 235. 5. Com. Dig. 335. 532.

REPLEVIN of the taking of three oxen, upon the 3d *September*, 20. *Jac.* 1. at *Eaſt-Grinſtead*, in a place called *Horſe-Shoe-Meadow*, The defendant makes conuſance, as bailiff to *Sir Henry Compton* and *John Blund*, for that the place WHERE was ten acres of meadow, *quòdque diu ante tempus quo, &c. ultimus preſbyter celebrando divina in eccleſiâ de Eaſt-Grinſtead* was ſeiſed in fee of a meſſuage called *Boyles*, and of 100 acres of land, 40 acres of meadow, and 30 acres of paſture, in *Eaſt-Grinſtead* aforeſaid, whereof the place

WHERE,

WHERE, time whereof, &c. and of all the time, &c. was parcel *in jure presbyteratûs sui*, and held them of *Lord Windsor* and *John Sherry*, as of their manor of *Brambleton*, in the county of *Sussex*, by fealty and rent of eighteen shillings and four broad arrows annually at *Michaelmas* to be paid, and suit of court and heriot; of which services the said *Lord Windsor* and *John Sherry* were seised by the hands of the said last presbyter, as by the hands of their *veraytenant*; and being thereof so seised, the said last presbyter continued his possession until the statute 1. *Edw.* 6. c. 14. of chantries (*a*); and shews the statute, with the saving of all rents, suits, and services, whereby the king was seised in fee of the tenements *unde*, &c.; and that the said king, in the fourth year of his reign, granted them to *Thomas Reve* and others, whose estate one *John Cornford* now hath; and that the said *Lord Windsor* and *John Sherry* were seised in fee of the said manor of *Brambleton*, before the said statute and after; and that after the said statute, *viz.* in 5. *Eliz.* they infeoffed one *Pickering* of the said manor and rent, and so by divers mean conveyances the same manor came to the hands of the said *Sir Henry Compton* and *John Blund*, in the fourteenth year of *James* the first; and for the rent of eighteen shillings for one year behind, at *Michaelmas*, 20. *Jac.* 1. he made conusance as bailiff to them, as in land chargeable to their distress, for the said rent *in formâ prædictâ*; and avers, that *presbyteratûs prædictus fuit in esse* within five years before the statute of 1. *Edw.* 6. c. 14.; and makes divers other averments, that the lands were within the statute, and that they were within the saving of the statute.

The plaintiff in bar of the conusance pleads *protestando*, that the said priest "*non tenuit*;" and *protestando* to all the mean conveyances, "*pro placito dicit*," that the said *Sir Henry Compton* and the said *John Blund*, *nec aliquis alius*, whose estate they have in the said manor, were seised of the said rent within forty years *ante tempus quo*, &c.

Thereupon it was demurred; and this case was oftentimes argued at the bar and bench.

The sole question was, Whether this rent be within the statute of 32. *Hen.* 8. c. 2. of limitations (*b*)? for if it be, then no *seisin* being had within forty years (as is confessed by the demurrer), he is to be barred of that conusance.

YELVERTON, HUTTON, and RICHARDSON, *Justices*, argued for the defendant, that although it be a rent within the words of the statute, yet it is out of the intent of the statute; for the statute extendeth only to rents services, and rents by prescription; but rents which begun by deed within time of memory were created *quasi* by an act of parliament, and so (their beginning known) are out of the intent of the statute; for that intended only such rents whereof *seisin* ought to be alledged in an avowry; and being alledged shall bind the party, unless there be a traverse: and when seisin is alledged it is but formal, and not the substance; as it is where an avowry is made of a rent created by deed, or reserved by grant within time of memory, although seisin be there alledged,

5. Co. 65. a.

F. N. B. 11. e.

(*a*) Cro. Jac. 51. Hob. 223. Moor, 865. 1. Leon. 38. Lane, 113. 115. Dyer, 81. 1. Roll. 152. 427. 2. Roll. 160. Goldsb. 93. Styles, 36. 82. 2. Bulst. 120. 3. Bulst. 151. 267. 252.

(*b*) See 1. Mary, c. 5. and 21. Jac. 1. c. 16.

yet

Fawkeners against Bellingham. Plowd. 95.

yet it is not traverſable, but the deed only which is the title, as it is held in *Sir William Foſter's Caſe* (*a*), and *Lofeild's Caſe* (*b*): ſo rent created made by act of parliament, the beginning thereof being by the act, that is his title, and the *ſeiſin* is not material: and although the ſaid rent were a rent-ſervice, yet by the conſtruction of the act of 1. *Edw.* 6. c. 14. it is turned into a rent-ſeck; and the beginning of that turning being known, it is therefore as a rent created by parliament.

Yelverton and Hutton called it a rent coming out of the womb of the parliament, and therefore no time to have *ſeiſin* thereof within forty years, for the ſtatute preſerves it to him; and as he hath loſs thereby as lord, that he cannot have eſcheats and other profits which a lord hath, ſo hath he benefit, that *laches* of time or *ſeiſin*, although an hundred or two hundred years, ſhall not prejudice him; and therefore compared it to the caſe of a rent-charge by deed, or a rent granted upon equality of partition, in an avowry for them; although *ſeiſin* be alledged, yet it is not material nor traverſable, nor is it of neceſſity to alledge it; and this ſtatute of 1. *Edw.* 6. c. 14. taking away the ſeignory, the rent, which is the fruit, ought to be conſtrued as liberally and beneficially as may be: and this avowry is grounded upon the ſtatute of 1. *Edw.* 6. c. 14. which he ſhews in his avowry, and therefore is out of the ſtatute of limitations, which extend to avowries at the common law. But they agreed, that it is the ſame rent in eſtate as it was before, *viz.* if it were an eſtate for life, the remainder over, ſo it ſhall be now; and if it were deſcendible on the part of the mother, ſo it ſhall now deſcend in the ſame manner: but it is altered in quality, for it is turned into a rent-ſeck, and the beginning thereof being known, is therefore out of the ſtatute, *id eſt*, out of the intent of the ſtatute, although not out of the words; and compared it to the caſe where confirmation is within time of memory to hold by ten ſhillings rent, whereas before he held by twenty ſhillings rent, although there were not any ſeiſin of this rent within forty years, yet it is out of the ſtatute; as if judgment be in a *per quæ ſervitia*, ſuch rent is out of the ſtatute, becauſe there is a record thereof; ſo foraſmuch as this rent is turned into a rent-ſeck by the parliament, it is out of the ſtatute.

5. Com. Dig. 528. 532.

But it was argued by Harvey and Myself to the contrary, that this is within the ſtatute; for the ſtatute extends to all rents, ſuits, and ſervices, ſo it is within the words: and we alſo conceived it to be within the intent; for although it be a new rent-ſeck, and was before a rent-ſervice, and the time of the alteration thereof is known, yet becauſe the beginning of the creation of this rent is unknown, and it is the ſame rent it was before (for it is parcel of the manor as before), as 31. *Aſſ.* 23. which proves that it is an ancient rent, time whereof memory, &c. and alſo the ſeiſin, before it was turned into a rent-ſeck, is ſufficient to have an aſſiſe, as *Bevill's Caſe* (*c*); and therefore the rent being an ancient rent is diſtrainable of common right. And that this is not a new rent, made or created by the 1. *Edw.* 6. c. 14. appears by this, becauſe the ſtatute ſaves only all ancient rents, &c.; and by conſtruction of

Co. Lit. 153. a.

(*a*) 2. Co. 94. (*b*) 10. Co. 108. (*c*) 4. Co. 9.

law

law this ſhall be taken to be and ſaved to the lord as a rent-ſeck, becauſe the king cannot be a tenant nor hold of any, as the tenant before did (*a*). And this rent is not as a rent given by the ſtatute; for a ſaving in an act of parliament is no giving of any new thing, unleſs in ſome ſpecial caſe, being a ſaving of that which was *in eſſe* before, and it is *quaſi* an exception or forepriſe out of the ſtatute; as it is held *Plowd.* 563. 35. *Hen.* 6. 34. 26. *Aſſ.* 66 8. *Edw.* 3. 67. 9. *Edw.* 3. 27. *Hen.* 8. *title* "*Parliaments*," 77. So this ſaving being general doth not give this rent, but is a ſaving of it out of the ſtatute, where otherwiſe it would have been extinguiſhed and loſt; for every one is intended to give all their rights in ſuch lands or rents iſſuing out of the ſame, but only ſuch as are ſaved thereby: ſo the ſtatute doth not give nor make any new thing by the ſaving, but ſaves that which before was in being, and ſo it is the ſame rent. And this is proved by the averment, that he had ſuch rent before; ſo it is not to be compared to a rent made or created by a deed or record within time of memory; for this is a rent whereof the beginning is not known, and therefore of neceſſity ſeiſin muſt be alledged thereof in an avowry. And this *ſeiſin* is always traverſable; for in an avowry the *ſeiſin* is the principal matter which ought to be alledged, and it ſhall be traverſed; as it is held in 9. *Co.* 34. 36. a. *Bucknall's Caſe*, 27. *Hen.* 8. 4. & 20. 34. *Hen.* 8. "*Averment*," 113.: and *ſeiſin* alledged ought to be confeſſed and avoided, as by coercion of diſtreſs, or traverſed; and a traverſe ſhall never be of a ſeiſin generally, but ever of a ſeiſin within time of limitation, as the books are, *Dyer*, 107. 315. 8. *Co.* 64. *Warren's Caſe*, cited in *Foſter's Caſe*, 10. *Hen.* 6. 6. *Keilw.* 13. *Hen.* 7. 31. 21. *Hen.* 7. 7. *Dyer*, 330. And whereas it was affirmed, that ſeiſin ſhould not be alledged or traverſed, becauſe the rent is changed within time of memory, that cannot be a reaſon; for then when the lord purchaſeth the tenancy or *meſnalty*, he ſhall have a ſurpluſage of the ſervices, which are notwithſtanding diſtrainable of common right, as the book 2. *Edw.* 3. "*Extinguiſhment*," 1. 20. *Edw.* 3. "*Avowry*," 126. and therefore it is againſt law that the lord ſhould be bound in that caſe to any time of ſeiſin. And this ſtatute of limitations is favourably to be expounded, to repreſs the miſchiefs, and not to be enlarged in time further than the ſtatute appoints, as *Plowd.* 371. *per* CATIM *in caſes of fines*, which is the reaſon there given that copyholds are within that ſtatute; and it being within the miſchief and remedy intended by the ſtatute, ought to be conſtrued according to the rules in 3. *Co.* 7. *Heydon's Caſe*. Wherefore they concluded for the plaintiff.

FAWKENER *againſt* BELLINGHAM.

Poſt. 101.

Co. Lit. 268. b. Pl. Com. 95. a.

Ante, 45.

But by reaſon of the opinion of THE OTHER THREE JUSTICES, judgment was given for the defendant.—But afterwards a writ of error being brought in the king's bench upon the point of law, the judgment was reverſed, *quod vide poſtea*, *pag.* 214.

(*a*) *Dyer*, 313. 1. Co. 47. a. 8. Co. 118. b. Co. Lit. 1. b. Plowd. 212. 6. Co. 5. 2. Roll. Ab. 513.

Memorandum.

Case 4.

Memorandum.

Serjeants at law and their ſervants ſhall be impleaded only in the COMMON PLEAS, and not elſewhere.

2. Inſt. 274. 422. 563. Cro. Jac. 668. 2. Lev. 129. Ld. Raym. 399. 2. Bl. Com. 24. 3. Bl. Com. 27.

IN the laſt vacation, a ſervant to SERJEANT HEADLY uſually attending on him was arreſted on a proceſs out of the court of THE MARSHALSEA, and thereupon obtained a writ of privilege out of this court, reciting, that ſerjeants at the law who are attending this Court, and their ſervants ordinarily waiting on them, ought to enjoy the privilege to be ſued in this court; which being delivered to the ſteward of the ſaid court, he would not allow thereof, ſuppoſing ſerjeants at law ought not to have ſuch privilege for them and their ſervants, and that he might not be ſued by bill filed againſt him, as 11. *Hen.* 6. *pl.* 8. *Dyer*, 24. *Book of Entries*, 430, 431.

And now this matter was moved to this Court, that they ought to have the privilege, for they are properly attendant at this bar, and none others are admitted to practiſe here: and although peradventure it may be doubted, whether he may be ſued by bill filed, becauſe there cannot be a *fore-judger* againſt him, yet he may be ſued here by original: and precedents were ſhewn, one, where MARTYN, *Serjeant*, was arreſted in *London*, at the ſuit of the *Biſhop of Wincheſter*, and at the ſuit of others, and had a writ of privilege, reciting, that ſerjeants at the law were to be attendant to the ſaid court, *ex officio plus quam alibi*, and that their ſervice was neceſſary at this bar, and therefore commanded them to ſurceaſe, and to proſecute their ſuits in the common pleas.

WHEREUPON it was allowed, and the party diſcharged of the ſuit in the court of *Marſhalſea*.

Hilary Term, 26. & 27. Car. 2. In B. R.

A copy of the record and writ produced was as followeth: "REX *majori et vicecomitibus* LONDON, &c. *Cum omnes et ſinguli de* "*curia noſtra de banco, in veniendo verſus curiam noſtram, ibidem mo-* "*rando et exinde verſus propria redeundo ſub protectione noſtra eſſe de-* "*beant, et à tetis temporibus retroactis conſueverunt, juri convenit ipſis,* "*et quibus in eadem curia; Nos de noſtris ligis, conſervare dignemur exhi-* "*beretur pro eiſdem noſtrum privilegium ſpecialius protegi quietius defen-* "*dere. Nulli liceat judici ſeculari placita verſus eos mora, niſi in felo-* "*niarum appealorum, vel liberi tenementi cauſis alibi, quam in banco præ-* "*dicto cognoſcere vel tenere; quidam tamen* HENRICUS *epiſcopus* Win- "toniæ, *et* JOHANNES PODRIDGE, *curiæ noſtræ prædictæ privilegia,* "*noſcientes, nec ingendo, nec indigendo miniſterium* JOHANNIS M. *ſervi-* "*entis ad legem: qui ex officio incumbit in curia illa potius quàm in alia* "*miniſtrare, præſertim cum eadem curia ulterius gradus perſonarum,* "*quam ſervientes ad legem non permittit, diverſas debiterum querelas,* "VIZ. *prædictus epiſcopus unam ſuper demandum* 100*l. et prædictus* "JOHANNES PODRIDGE *alteram ſuper demandum de* 12*l. verſus ipſum* "JOHANNEM M. &c. *coram vobis præfatis majori ſecundas affirma-* "*rent, et per certa bona ſua per miniſtros veſtros attachiari, contra præ-* "*dictæ curiæ noſtræ privilegium, minus debite procurarent. Veſque* "*præfatus major querelas prædictas coram vobis in curia veſtra circiter* "*prædictas ſummas perſiſtitis terminand. prout ex ipſius* J. M. *querela* "*accipimus, unde nobis ſupplicavit ſibi per nos de remedio provideri; et* "*quia eidem* J. M. *fieri, quod eſt juſtum, et libertati et privilegio curiæ* "*prædictæ inviolabiliter obſervari volumus, vobis præcipimus, quod vos* "*præfatus major ſi querelas prædictas vel earundem alteram ſumpſeritis,*

"*alioquin*

" *alioquin vos præfati vicecomites de placitis ſuperſedeatis, querela vel* " *earundem alteram coram vobis, et quemlibet veſtrum de placitis illis,* " *et aliis quibuſcunque verſus præfatum* J. M. *quocunque nomine cenſea-* " *tur, coram vobis ſedente curia noſtra de banco prædicto, motis vel mo-* " *vandis ſuperſedeatis omnino.* Teſt. &c." MEMORANDUM.

NOTE this writ well, that ſerjeants only ſhall attend at the common pleas, and ſhall be impleaded there, and not elſewhere (*a*). (*a*) *Sed vide* 3. Salk. 182. 1. Mod 298.

2. Lev. 119. 3. Keb. 424. 4. Mod. 226. Strange, 738. *contra.*

Memorandum.

CASE 5.

GEORGE VERNON, a reader of the *Inner-Temple*, received in the time of the laſt long vacation a writ to be ſerjeant, returnable *menſe Michaelis*, and thereupon he appeared upon the laſt day of *October*, which was the *quarto die poſt*, in chancery; yet the prothonotary ſaid, that he might have appeared there the firſt day, or any day before the fourth day. Being ſworn in chancery, he had afterward day given him to appear in the common pleas, until the 8th of *November*, at which day he came in the morning to *Serjeants-Inn* in *Fleet-ſtreet*, accompanied with the benchers and others of the ſociety of THE INNER-TEMPLE, and there, before the juſtices of the ſame houſe, and LORD RICHARDSON, *Chief Juſtice* of the common pleas, the other juſtices of *Serjeants-Inn*, in *Chancery-lane*, not being preſent, he went in attended with the warden of the *Fleet* and the uſher of the exchequer, and there, without any ſpeech made (as the uſual courſe is by chief juſtice), he recited his COUNT, and after demand of *oyer* of the writ by one of the ſerjeants, the writ being read by the chief prothonotary, and DEFENCE made by another ſerjeant, he kneeled, and his *coif* and *hood* were put on, and he diſmiſſed; and afterward, the ſame day, went to the common pleas, and was there preſented by two of the king's ancient ſerjeants, and then recited his COUNT; and DEFENCE was made, and the writ read, and he placed in his place of *puiſne ſerjeant*. MR. GEORGE WILD, one of the utter barriſters of the *Inner-Temple*, delivered rings for him with this inſcription, " *Rex Legis Regnique* " *Patronus.*" Afterwards, upon the ſeventeenth day of *November* the ſame Term, he was made one of the barons of the exchequer. The ceremony of calling *Mr. Serjeant Vernon.* Ante, fol. 67.

BROWNLOW, *Chief Prothonotary*, ſhewed me theſe precedents. Hob. 68. 1. Brownl. 47.

Lovelace *againſt* Cocket.

CASE 6.

Michaelmas Term, 6. *Jac.* 1. *Roll* 1001.

DEBT upon a bond. The defendant pleaded acceptance of another bond in diſcharge of the obligation aforeſaid, and ruled by THE COURT to be ill. In debt on bond, the defendant cannot plead the acceptance of another bond in ſatisfaction. Poſt. 193.—1. Mod. 225. Cro. Eliz. 716. Cro. Jac. 100. 579. 650. Hobart, 68. 86. 6. Co. 44. 1. Brownl. 74. 1. Burr. 9. 2. Com. Dig. 459, 460. See the caſe of Meaſe v. Meaſe, Cowp. 47.

Branthwait *againſt* Cornwallis.

CASE 7.

Michaelmas Term, 2. *Jac.* 1. *Roll* 3272.

DEBT. He pleaded acceptance of a ſtatute-ſtaple after the day of payment, and it was held no plea.

Case 8.

Maynard *againſt* Crick.

Trinity Term, 41. *Eliz.* *Roll* 1409.

Cro. Eliz. 716. Co. Lit. 212. b. *contra.*

DEBT upon a bond. The defendant pleaded acceptance of another bond in ſatisfaction of the firſt obligation; and it was ruled by the Court to be no good plea.

Case 9.

Oliver *againſt* Leaſe.

Trinity Term, 14. *Jac.* 1. *Roll* 734.

5. Com. Dig. 256. 2. Term Rep. 24.

DEBT upon a ſingle bill. The defendant pleaded, that he infeoffed the plaintiff of ſuch land in diſcharge of the ſaid bill, which he accepted; and it was held to be an ill plea. *Vide* 4 *Hen.* 8. *Dyer*, 1. 12. *Hen.* 4. *pl.* 23.

Case 10.

Young *againſt* Young.

If an infant be admitted to ſue by guardian, and, by the miſtake of the clerk, the admiſſion is not entered, the roll may be amended by the judge's notes; for neither the act of the Court, nor the negligence of its officers, ſhall prejudice a ſuitor.

FORMEDON IN DESCENDER. After judgment upon a verdict, the record being removed by a writ of error, it was moved to have it amended in the FILAZER'S ROLL, *viz.* "Whereas "the defendant was admitted before JUSTICE JONES, in *Eaſter* "*Term*, 22. *Jac.* 1. being then juſtice of the common pleas, to pro- "ſecute *in omnibus actionibus.*" This was entered in the PLEA ROLL; and on viewing the roll, it was "*quod conceſſum eſt per Cu-* "*riam*, that the defendant, by ſuch a one his guardian, ſhould pro- "ſecute, &c.;" and ſo it is entered in the remembrance. And the filazer's roll is, that "*John Young*, by *J. S.* his guardian, *ad hoc* "*admiſſus per Curiam, obtulit ſe quarto die, &c.*" But there was no entry in the FILAZER'S ROLL, as is uſual in ſuch caſes; "*quod* "*conceſſum eſt per Curiam, quid petens ſequatur per J. S.* his guardian.

Hutton, 92. Jones, 177. Hetley, 52. 1. Lev. 224. Cowp. 425. Dougl. 376. 730. 1. Term Rep. 783.

The queſtion was, Whether this may be amended and inſerted?

And ALL THE COURT held it might well be amended, notwithſtanding the writ of error brought and the record removed; becauſe it appears by the note under JUSTICE JONES's hand, that he admitted "the guardian *ad proſequendum*;" and by the ſeveral entries it appears, that "he ſued by his guardian:" and the entry in the roll in the filazer's office is, *quod obtulit ſe*; ſo the admittance of the guardian appearing to be before the *obtulit*, it is the omiſſion of the clerk, or rather the act of the Court, which did not cauſe it to be entered in the FILAZER'S ROLL; it ought not therefore to prejudice the party, no more than the not entering of a warrant of attorney, when it appears he hath a ſufficient warrant of attorney, which hath oftentimes been uſed to be entered upon examination of the truth, although a writ of error be then brought. Wherefore by the rule of the Court it was ordered to be amended.

An infant may ſue either by *guardian* or *prochein amy*. Poſt. 161.

But ſome doubt was made, Whether admittance to ſue *by guardian*, where it ought to be by *prochein amy*, be good, as it is in *F. N. B.* 27. h?—But THE COURT delivered no opinion therein, becauſe there were many precedents that ſuch entries had been both ways (*a*).

(*a*) See S. C. Jones, 177. where this point of the caſe is reported at large, and 5. Com. Dig. 197. 199. Cowp. 128. See alſo Cro. Jac. 640. Poſt. 161. and Mr. Hargrave's note (1) Co. Lit. 135. b.

Kirton's

Kirton's Case.

CASE 11.

In the Court of Wards.

If a mortgage be made on condition to re-enter on payment of the principal at such a day, by the mortgagor or *his heirs*: and he die before the day leaving issue a *daughter* only, who redeems at the day, and enters, and afterwards *a son* is born, the daughter shall retain the lands, for she is in the nature of a purchasor.

1. Co. 99. Co. Lit. 11. Hob 3. 3. Co. 61. 1. Salk. 227. 2. Vern. 579. Skin. 430. 4. Mod 282. 3. Lev. 408. 3. Bac. Abr. 639. 640. Cowp. 2, 8.

NOTE. Upon an assembly of all the Justices and Barons in *Serjeants-inn*, in *Fleet-street*, the case was propounded before them by HYDE, *Chief Justice*, which had been argued before the two Chief Justices and Chief Baron, being the case of one *Kirton* referred to them out of the court of wards.

A man mortgages upon condition, that if he or his heirs repay one hundred pounds at such a day he shall re-enter: he dies, leaving issue a daughter only, his wife being *priviement enseint* with a son. The daughter and heir at the day pays the hundred pounds, and afterwards the son is born.

The question was, Whether the son shall enter upon the sister, or if she shall retain it for ever?

Vide 1. *Co.* 95. a. 99. a. *Shelley's Case*, that the daughter who paid the money shall retain it; for *qui sentit onus sentire debet et commodum*. And 9. *Hen.* 7. 21. by WOOD, that if the daughter enter for a condition broken, and afterward a son is born, the son shall not take advantage, &c. because he hath not any right at the time of his entry.

And it was held by HYDE, *Chief Justice*, WALTER, *Chief Baron*, DENHAM, HUTTON, WHITLOCK, HARVEY, YELVERTON, and MYSELF, *Justices*, that the sister shall retain it against the son born, after performance of the condition: for inasmuch as she paid the money (and if she had not paid it the land had been lost *(a)*), if she could not retain the land against the son, she hath no remedy for the money; and by payment thereof she hath gained the land, and is in as *a purchasor*, although she were entitled thereto by the condition, and as *heir*, and she shall retain it as she shall the *perquisite* of a villain, and as land gained by her vigilancy; for otherwise it should be lost to both, and she should lose both land and money; therefore the law wills that she shall retain the land.

But RICHARDSON, *Chief Justice* of the common pleas, and DODRIDGE, held strongly the contrary, because she hath it *as heir*, and then the nearer heir being born shall defeat it: and it was in her a voluntary act to pay the money, which she might well have omitted; and she paid it of her own head, and at her own peril.—JONES and TREVOR, *puisne Barons*, doubted thereof, and would not deliver any opinion, but rather inclined that the son should have it *(b)*.

(a) See 7. Geo. 2. c. 20. for the more easy redemption and foreclosure of mortgages.

(b) *Vide* 10. & 11. Will. 3. c. 16.

Halley's Case.

CASE 12.

The university of Oxford cannot claim *conusance* of an ejectment brought to recover possession of a term.

Vide ante, p. 73. Lit. Rep. 252. 5. Bac. Abr. 328.

EJECTMENT upon a lease of a messuage in *Oxon*. The defendant being principal of *Glouceſter-hall*, in *Oxford*, pretended, that he being a scholar in *Oxford*, and a privileged person, ought to be sued before the vice-chancellor in *Oxford* according to their course of proceedings there, *secundum morem universitatis*, and according to the charters granted to the universities in the 3. *Rich.* 2. and the

HALLEY'S CASE.

14. *Hen.* 8. and confirmed by parliament in the 13. *Eliz.* c. 29. wherefore he prayed there might be a ſtay of the proceedings in this court; and ſhews their charters, that they had conuſance of all ſuits, contracts, covenants, quarrels (except concerning freehold); and this being a perſonal action, they ought to have conuſance thereof.

DAMPORT, *for the univerſity*, ſhewed an ancient record in this court in 22. *Edw.* 1. where a plea of covenant was brought in the court of the vice-chancellor of the univerſity of *Oxford*, by reaſon of a contract made before that time, wherein was granted to them that they ſhould have conuſance of all actions perſonal and contracts; and the covenant in queſtion was, that he ſhould enjoy ſuch an houſe in *Oxford* for a year; and becauſe this court of the common pleas had granted a prohibition to ſtay the proceedings in the ſaid ſuit, being begun in the court chriſtian before the vice-chancellor, the record mentioned, that upon the ſhewing of this charter, it appearing the action was brought only upon the contract, and not *pro domibus*, therefore a conſultation was granted: and it was prayed here, becauſe this action was but perſonal, that they might have conuſance thereof.

But ALL THE COURT denied it, and affirmed that the vice-chancellor had not any juriſdiction, nor might hold plea thereof; for in this action he ſhall recover poſſeſſion, and ſhall have an *habere facias poſſeſſionem*, and thereby he that hath a freehold may be put out of poſſeſſion: and it is not like to the record ſhewn, for there it is only an action of covenant, wherein the plaintiff ſhall recover damages only, and therefore reaſon to grant a *procedendo* there; but here he ſhall recover poſſeſſion, and therefore by their own rules they ought not to hold conuſance, nor have liberty to proceed in this caſe.

5. Co. 105. a. 9. Co. 78. a. Lit. Rep. 252.

NOTE, That by this ancient record, it appears what are the privileges of the ſaid univerſity, and the juriſdiction of this Court to grant a prohibition where they proceed in the court chriſtian, in prejudice of the common law, without reſorting to the chancery.

CASE 13.

Whytmore *againſt* Porter.

If a perſon act as an executor *de ſon tort*, by conſent of the perſon who afterwards becomes adminiſtrator, and he adminiſters all the goods which the inteſtate died poſſeſſed of, an action will not lie againſt the executor *de ſon tort*. Cro. Eliz. 102. 406. 505. 565. 5. Co. 30. a. 34. a. Heb. 49.

SIR WILLIAM WHITMORE and others, executors of *Lady Craven*, againſt *Elizabeth Porter*, executrix. In the exchequer, upon a ſpecial verdict, the caſe was this:

The defendant, as EXECUTRIX *de ſon tort demeſne*, takes divers goods into her hands, to the value of four hundred pounds, and ſells them by the aſſent and direction of *John Porter* her ſon, who afterwards takes letters of adminiſtration, and paid the juſt debts upon ſpecialties, as far as the goods of the inteſtate amounted to, as well to the value of the ſaid four hundred pounds ſold by his mother, as of all the goods whereof the inteſtate died poſſeſſed; and after that an action of debt was brought againſt the *feme* as EXECUTRIX *de ſon tort demeſne*, who pleaded *plene adminiſtravit*: and upon evidence all this matter was diſcloſed. The queſtion was, Whether ſhe ſhall be chargeable or not?

contra. 1. Mod. 214. 6. Mod. 213. 1. Sid. 76. Vent. 349. 1. Com. Dig. 266. Cowp. 384. 2. Term Rep. 97. 587. 3. Term. Rep. 587.

ALL

And it was adjudged by ALL THE BARONS, who delivered their opinions *seriatim*, that she shall not be charged, but that the plaintiff shall be barred; for this action being brought after the administration committed, and when she was chargeable for those goods to the administrator, and when the administrator had fully satisfied in paying the debts of the intestate, as far as all the goods of the intestate amounted to, it is not reason she should be charged against the plaintiff, for then she should be doubly charged, *viz.* to the administrator, and also to the creditors: also it is not reason that more should be satisfied out of the goods of the intestate to the creditors than the goods of the intestate amounted to; and so much being satisfied by the administrator, they should not have more: but if the action had been brought against her before the administrator had fully administered all in debts, peradventure it might have been otherwise; for she having gained goods into her hands, is chargeable for them, as EXECUTRIX *de son tort demesne*, until she give satisfaction for them to the true administrator, or she herself satisfy for the true debt to the value. Whereupon it was adjudged for the defendant.

WHYTMORE *against* PORTER.

Hobart, 43.

Kinaston *against* Moor.

CASE 14.

Hilary Term, 2. *Car.* 1. *Roll* 850.

ERROR in the exchequer chamber of a judgment in the king's bench in action of TROVER AND CONVERSION of divers goods, and among other things of 190l. *in pecuniis numeratis*. Upon not guilty pleaded, a verdict was found for the plaintiff, and entire damages given. The error was assigned, Because *trover* and *conversion* cannot be of money out of a bag.

But ALL THE JUSTICES AND BARONS agreed, that it well lies: for although it was alledged that money lost cannot be known; and so whether it was the plaintiff's money, whereof the *trover* and *conversion* was, as is the charge of this action, yet the Court said, it being found by a jury that he converted the plaintiff's money (for the losing is but a surmise and not material, for the defendant may take it in the presence of the plaintiff, or any other who may give sufficient evidence; and although he take it as a trespass, yet the other may charge him in an action upon the case in a *trover*, if he will), the plaintiff had good cause of action. Wherefore the judgment before well given was now affirmed.

THE JUSTICES AND BARONS said, that this action lies as well for money out of a bag, as of corn which cannot be known.

5. Bac. Ab. 264.

Trover for money *out of a bag* is good *after verdict*; but damages for the *conversion* only, and not for the *taking*, can be given.

Ante, 18.
Post. 262. 544.
1. Roll. Ab. 5.
Cro. Eliz. 819. 824.
Cro. Jac. 50. 262.
Co. Lit. 207. b.
Allen, 91.
Danv. 20.
Savil, 20.
Clayt. 113.
1. Mod. 31.
Stra. 128.
1. Com. Dig. 219.
1. Term Rep. 658.

Young *against* Pridd.

CASE 15.

Hilary Term, 2. *Car.* 1. *Roll* 778.—*In the Exchequer Chamber.*

TRESPASS (by the husband alone): For that the defendant, the fourth day of *October*, 22. *Jac.* 1. assaulted, beat, and ill-treated the wife of the plaintiff, and carried her away with such his goods, and detained her for half a year, *per quod solamen et con-*

A judgment recovered by a *husband alone*, for the *forcible abduction* of his wife, will not bar an action by *husband and wife*, or by the *wife alone* after her husband's death, to recover damages for the *battery*. Yelv. 89. Godb. 369.

Young *against* Peidd.

ſort'um quæ habere potuiſſet with his ſaid wife he loſt, *et alia enorm'a (a) ei intulit ad damnum, &c.* Upon not guilty pleaded, the verdict was found for the plaintiff, and judgment given accordingly; on which a writ of error was brought in the exchequer chamber.

The error aſſigned was, That the huſband hath brought this action for the *battery* of his wife, which he cannot do without his wife, and hath recovered damages for this battery; and therefore the judgment erroneous.

Ante, 36. Poſt. 175. Cro. Jac. 77. 502.

But ALL THE JUSTICES AND BARONS held, that the huſband in this action did not recover damages for the *battery* of his wife, but for the loſs which he had in wanting her company, and the *per quod conjortium* and abduction of her is one entire conjoined act, and for that cauſe the damages were given. For the battery, true it is, that the wife ought to have joined to recover damages; and this verdict and judgment do not bar the wife to have an action after the death of her huſband for the battery, or ſhe may join with her huſband in another action: and a precedent was ſhewn of 17. *Jac.* 1. *Hyde v. Sciſſor (b)*, where ſuch an action was brought *verbatim*, as this action is in the king's bench, and recovered; and afterwards a writ of error was brought, and the judgment affirmed: and ſo all the Juſtices and Barons here held; whereupon this judgment was alſo affirmed.

Strange, 61. 977. B. R. H. 54. 1. Wilſ. 256.

(a) 1. Keb. 787. 1. Sid. 225. Cro. Jac. 502. 664. 1. Mod. 127. Salk. 119. 642. 1. Com. Dig. 572. 2. Term Rep. 4. 166.

(b) Cro. Jac. 538. Eaſter Term, 13 Jac. 1. Roll 157. & 167.

CASE 16.

More *againſt* Hodges.

In the Exchequer Chamber.

If the *venire facias* be well awarded on the roll, the writ being miſ-dated ſhall not impede the judgment. Ante, 38. 54. Poſt. 273. 282. 327. 595. Poph. 269. Noy, 83. Latch. 15. Cro. Jac. 64. Moor, 492. Dougl. 124.

ERROR of a judgment in the king's bench in *aſſumpſit* for the payment of a thouſand pounds for a marriage portion; and verdict for the plaintiff upon *non aſſumpſit* pleaded, and judgment accordingly.

The error aſſigned was, That the iſſue was joined in *Trinity Term*, 2. *Car.* 1. and the *venire facias* bears date 4th *May*, 2. *Car.* 1. which was before the iſſue joined; ſo the trial thereupon was ill: and by a writ of *certiorari*, upon *diminution* alledged, to certify the writ of *venire facias* and *diſtringas* whereupon the trial was had, they being certified the writ was of the date of *quarto Maii*, which was in *Eaſter Term*.

Sed non allocatur: for the trial upon the *diſtringas*, and the roll of awarding the *venire facias* being good enough, the miſ-dating of the *venire facias* (which is a judicial proceſs) is no cauſe to ſtop the judgment; for it is but a miſ-ſuing of the proceſs at the moſt, and aided by the ſtatute of *jeofails*: and the Court intends, that there was another *venire facias* according to the roll, and ſubſequent to the iſſue, and ſo mentions the roll, and the *diſtringas* upon which writ the trial is by *niſi prius* made long after the iſſue; and therefore the trial is good, and ſhall be intended, that there was another *venire facias* warranted by the roll, and now wanting; and that this *venire facias* now certified is not the *venire facias* whereupon the trial was had. Wherefore, notwithſtanding the error aſſigned, it was held by all the Juſtices and Barons, that the trial was good, and aided by the ſtatute of *jeofails*.

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THE SECOND ERROR assigned was, Becauſe upon the *venire facias* is returned "*ſummonitus eſt*," where it ought to have been "*attachiatus eſt.*"—*Sed non allocatur*; becauſe is was but matter of form, which ſhall not be prejudicial after verdict. Whereupon the judgment was affirmed.

Summonitus inſtead of *attachiatus* upon the *venire* is matter of form.

Cro. Jac. 89. 108.

4. Mod. 246. Fort. 341. 1. Saund. 318. 1. Bac. Abr. 92. Tidd's Practice, 222.

Howell John *againſt* Thomas.

CASE 17.

Trinity Term, 1. Car. 1. Roll 158.—In the Exchequer Chamber.

ERROR in the exchequer chamber of a judgment in the king's bench in an ejectment.

If error be aſſigned in the *original*, and upon *certiorari* an erroneous original be returned, and the Court, after *in nullo eſt erratum* pleaded, grant a ſecond *certiorari*, upon which a good original is returned conſiſtent with the record, the ſecond certificate ſhall be received.

The error was aſſigned, Becauſe in the bill the plaintiff declares upon a leaſe for *three years*, but in the plea-roll, whereupon the iſſue is joined, and in the record of *niſi prius*, it is upon a leaſe for *five years*; ſo the bill and declaration varies. Diminution was alledged by the plaintiff, and by *certiorari* the bill was certified, that it was only for three years: and hereupon error being aſſigned, the defendant in the writ of error, when the plaintiff alledged diminution of the roll, had thereupon another writ of *certiorari*, whereby the bill was certified, wherein he declared upon a leaſe for five years; ſo it well warrants the declaration upon the roll and the *niſi prius*.

The queſtion was, Which of theſe certificates ſhould be allowed?

And it was held by ALL THE JUSTICES AND BARONS, that the ſecond certificate, upon the diminution alledged by the defendant in the writ of error, ſhould be received; for the bill certified upon it is intended the true bill, for it warrants well the declaration upon the roll and the record of *niſi prius*; and the other ſhall be intended a fictitious bill, and not the true one; and the allegation of diminution by the plaintiff in the writ of error, and procuring a certificate, ſhall not ſtop the defendant, without aſſigning of errors to alledge a diminution, and from procuring the true bill to be certified: ſo it is where the plaintiff in a writ of error alledgeth diminution, and procures an original to be certified, which doth not warrant the judgment. If in truth there be another writ original, which well warrants the declaration, the defendant in the writ of error, for affirmance of the judgment, may well alledge diminution, and have a *certiorari* to procure the true original writ to be certified. Whereupon the judgment was here affirmed.

Ante, 90. Poſt. 271. 282. 327. Moor, 701. Cro. Jac 131. 597. Styles, 352. 1. Com. Dig. 319. 5. Com. Dig. 297. 2. Bac. Ab. 206. 2. Cromp. Prac. 360. Cowp. 843. Dougl. 114.

Wolfe *againſt* Hole.

CASE 18.

WOLFE, attorney of the common pleas, brings an attachment of privilege againſt *Hole*, and declares in an action of the caſe upon an *aſſumpſit*. After verdict for the plaintiff, and judgment, error was brought and aſſigned, Becauſe there were no pledges entered upon the imparlance-roll.

The omiſſion of pledges on the *imparlance roll* in an attachment of privilege, cannot be amended by the *niſi prius* roll. Ante 46.—Hutton, 92. Hetley, 59. Dyer, 238. 3. Lev. 39.

WOLFE *againſt* HOLE.

Moor, 403. Cro. Eliz. 367. Cro. Jac. 414. Hob. 76. 3. Bulſt. 278. 1. Sid. 84. Ray. 51. Dyer, 288. 3. Lev. 39. 361. 3. Wilſ. 142.

HENDEN now moved, that this might be amended, and pledges inſerted; for in the *niſi prius* roll there the pledges are mentioned, which is ſufficient to induce the Court; and he ſaid it was but matter of form, and aided by the 18. *Eliz.* c. 13. after verdict.

But THE COURT denied the amendment; for although the iſſue-roll ſhall be amended by the imparlance-roll, becauſe it is precedent, yet the imparlance-roll ſhall not be amended by the iſſue-roll, being ſubſequent: alſo the record being removed they would not amend it; for they ſaid it was not form but ſubſtance. 18. *Edw.* 4. 9.

By 16. & 17. Car. 2. c. 8. after verdict no judgment ſhall be ſtayed or reverſed for this omiſſion; nor by 4. & 5. Ann. c. 16. any exception taken except on ſpecial demurrer.

CASE 19.

"Thy father," *innuendo* the plaintiff, "is a "thief," is not ſufficient, without an averment that the ſpeaking was to the ſon.

Cro. Eliz. 444. Cro. Jac. 231.

Phelps *againſt* Lane.

ACTION: For that the defendant ſaid of the plaintiff in preſence of divers of the king's ſubjects, "Thy father is a thief," *innuendo* THE PLAINTIFF. After verdict, upon *not guilty*, it was moved, that this declaration was not good, becauſe it was not alledged to be ſpoken to the ſon of the plaintiff, nor in their preſence; and the word "*innuendo*" helpeth not.—ALL THE JUSTICES were of this opinion. Wherefore it was adjudged for the defendant.

1. Brownl. 7. 3. Lev. 68. 166. Salk. 513. Cowp. 276.

CASE 20.

A pariſh in *reputation* which, in the forty-third year of queen *Elizabeth*, had, and ever ſince has had, parochial rates and churchwardens, ſhall be aſſeſſed towards the relief of its own poor.

Poſt. 394. 8. C. Jones, 356. S. C. Hutt. 63. Hobart, 67. 1. Sid. 292. 4. Mod. 157. Ray. 477 Cowp. 407. 425. 841. Dougl. 135. 1. Term Rep. 782.

Hilton *againſt* Robert Pawle.

Hilary Term, 2. Car. 1. Roll 630.

TRESPASS, for the taking a ſaddle of the plaintiff's at *Stoke-goldingham*. Upon not guilty a ſpecial verdict was found, *viz.* that the pariſh of *Hinkley*, in the county of *Leiceſter*, is, and time whereof, &c. was, an ancient rectory and pariſh-church; and that the village of *Stoke-goldingham* is an ancient village, and parcel of the rectory of *Hinkley* aforeſaid: and that from the time of king *Henry* the ſixth, and always afterward until this preſent, there is and hath been a church in the ſaid village of *Stoke-goldingham*, which, during all the ſaid time, hath been uſed and reputed as a pariſh, and that the inhabitants of *Stoke-goldingham* aforeſaid, during all the ſaid time, have had all parochial rites and churchwardens; and that the ſaid village of *Stoke-goldingham* is diſtant from *Hinkley* about two miles: and if *ſuper totam materiam in formâ prædictâ compertam videbitur juſtitiariis et curiæ hic*, that the aforeſaid village of *Stoke-goldingham* be ſuch a pariſh as by the ſtatute of 43. *Eliz.* c. 2. for relief of the poor, is chargeable to the maintaining their own poor, then they ſay the defendant is guilty, to the damage of ſeven pounds and coſts forty ſhillings: and if *ſuper totam materiam in formâ prædictâ compertam videbitur juſtitiariis hic*, that the aforeſaid village of *Stoke-goldingham* ſtands chargeable by the ſtatute aforeſaid to maintain the poor of *Hinkley* aforeſaid, then they ſay that the defendant is not guilty.

And upon this verdict being argued at the bar by ATHOE, *for the plaintiff*, and BERKLEY, *for the defendant*;

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THE COURT reſolved and delivered their opinions *ſeriatim* for the plaintiff, that this is ſuch a pariſh within the 43. *Eliz.* c. 2. as is chargeable for the relief of the poor of *Stoke-goldingham*, and not for the poor of *Hinkley*: for being found that it was a church in the time of king *Henry* the ſixth, *et tunc et ſemper poſtea* reputed for a pariſh, and not in the negative, that it was not a pariſh before, it may be well intended to be a pariſh before, and it doth not exclude, that it was not before time whereof, &c. And although it ſhould not be ſo intended, yet being found that it was a church *then*, and that there were churchwardens there, it is A PARISH within the ſtatute, although it be but a reputative pariſh, for being in uſe ſo long before the ſtatute, and at the time of the ſtatute, the ſtatute appoints that "the churchwardens, and three or four overſeers of the poor joined with them, ſhall, &c.;" and no churchwardens of *Hinkley* are churchwardens of *Stoke-goldingham*, and by conſequence have nothing to do there; and the churchwardens of *Stoke-goldingham* are only to meddle with the church there, and by conſequence with the poor of the pariſh: and the ſtatute hath an intention to confine the relief to pariſhes then *in eſſe*, and that every pariſh ſhould meddle with his proper village, and their poor are to be provided for there, and not elſewhere. Wherefore it was adjudged for the plaintiff. *Vide Nicholl's Caſe, fol.* 394.

HILTON *againſt* ROBERT PAWLE.

2. Bl. Rep. 1246. See Mr. Comyn's edition of Bott's Poor Laws, vol. i. page 66.

Oxford *againſt* Rivett.

CASE 21.

Vide Ante, 79.

THIS caſe was now moved again, and RICHARDSON, *Chief Juſtice*, HUTTON, and HARVEY, held their former opinion, that the iſſue was well enough joined, for there is no mention of any who *devaſtavit* in the replication; and neceſſarily it is intended, that the mother of the executor *devaſtavit*, for no other might make a *devaſtation*: and the rejoinder being, *quòd prædicta* KATHERINA *non devaſtavit, et de hoc ponit ſe ſuper patriam, et querens ſimiliter*, and being found for the defendant, *quòd non devaſtavit*, the plaintiff ſhall not avoid that verdict by ſaying, that it is not ſhewn who *devaſtavit*, ſo to take exceptions at his own replication.

A plaintiff ſhall not avoid a verdict by an exception to his own replication. Ante, 79, 80. S. C. Hetl. 60. 1. Term Rep. 40. 2. Ter. Rep. 758. 3. Ter. Rep. 374.

HUTTON, *Juſtice*, ſaid, admitting that no iſſue be joined, and that the verdict might not aid it, yet the judgment ſhall be againſt the plaintiff, for his replication is ill for another cauſe; for in the bar the defendant alledgeth, that ſhe had adminiſtration committed to her *durante minore ætate* of *Rivett*, the ſon of the inteſtate, and that he came of age in 9. *Jac.* 1. and that afterwards he refuſed to be executor, and the adminiſtration was committed to *Sir Hugh Wirrell*, 3. *December*, 19. *Jac.* 1. The plaintiff replies, that before the commiſſion of the adminiſtration to the ſaid *Sir Hugh Wirrell*, viz. 6. *October*, 19. *Jac.* 1. *devaſtavit*; which admitting it ſhould be intended that KATHERINA *devaſtavit*, yet that was a devaſtation after *Rivett* the executor came of age (who came of age in 9. *Jac.* 1.), and then ſhe might not be chargeable therewith; ſo the allegation that *devaſtavit* 19. *Jac.* 1. is ill; and therefore judgment ought to be given againſt the plaintiff.

To a *ſcire facias* againſt an adminiſtratrix *durante minore ætate*, &c. if the defendant plead that the executor came of age on ſuch a day, and that ſhe had then fully adminiſtered, a replication alledging a *devaſtavit* after that day is bad.

But for the other point, YELVERTON and MYSELF held our former opinion, that here is no iſſue; for intendment will not aid

The ſtatutes of jeofail will not aid a verdict on an iſſue totally miſ-joined. Ante, 80. 1. Com. Dig. 332. 1. Term Rep. 151.

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OXFORD *against* RIVETT.

a replication; and being no iſſue, the verdict is void, and not aided by any of the ſtatutes of *jeofail*.

But by the opinion of the other three Juſtices judgment was given for the defendant.

CASE 22.

Weſtley *againſt* Allen.

A prohibition ſhall go to reſtrain probate of a will after *non deviſavit* found at law, or if part of the will relate to land. Poſt. 115. 166. 396. Moor, 873. Cowp. 330. 424. 2. Term Rep. 473.

A PROHIBITION was prayed for *Weſtley* againſt *Allen* to ſtay a ſuit in the ſpiritual court, concerning the probate of a will which was of goods and land, which will was alledged to be revoked (and ſo it proved) upon a ſuit at the common law for the land. Upon iſſue of "*non deviſavit*," it was proved to be abſolutely revoked *in toto*, and a "*non deviſavit*" found; and now the ſuit is in the ſpiritual court to prove it to be a good will and not revoked. Upon this ſuggeſtion THE COURT gave day, if cauſe were not ſhewn to the contrary, that a prohibition ſhould be granted: for the Court held, that if the queſtion had been in the ſpiritual court for probate of a will of goods and land, and making an executor, that they ſhould not proceed to prove the will *quoad* the land, but that a ſpecial prohibition as to the land ſhould be granted.

CASE 23.

Morant *againſt* Cumming.

Qu. If the king's patentee of foreſt lands belonging to the Crown can preſcribe in *non decimando*?

Hetley, 60. Moor, 915. 1. Lev. 185. 2. Co. 44. a. Cro. Eliz. 785. Styles, 237. 3. Burr. 1273.

MORANT, leſſee of the earl of *Hertford*, againſt *Cumming*, vicar of *Lirbeck*, prays *a prohibition* to ſtay a ſuit in the ſpiritual court for tithes, becauſe the lands were parcel of the foreſt of *Beare*, whereof KING JAMES was ſeiſed in fee *in jure coronæ*, and he and all his predeceſſors held it diſcharged of payment of tithes, and granted it to the ſaid *earl of Hertford* in fee, and ſo he ought to hold them diſcharged. And it was doubted whether the patentee may have ſuch privilege, or that it be only a privilege annexed to the crown during the time that the land was in the crown. But it was granted *de bene eſſe*, unleſs cauſe were ſhewn to the contrary ſuch a day (*a*).

(*a*) *Vide* Hartford *v.* Leach, W. Jones. 387. where after divers arguments at the bar it was adjudged, that the king may preſcribe *in non decimando*, becauſe he is *perſona mixta*; but that this is a perſonal privilege, and therefore his grantee ſhall not have the benefit of it. S. P. Hard. 315. 1. Roll. Abr. 655.

CASE 24.

Owen *againſt* Thomas ap Rees.

Hilary Term, 2. Car. 1. Roll 1789.

A leaſe for three lives, dated 30th *Auguſt*, *habendum* from the day of the date, and livery made 1ſt September, is good. Poſt. 388. Hetl. 22. 27. Cro. Jac. 563. 5. Co. 94. b. Cowp. 714.

ACTION OF TROVER of twenty loads of wheat, &c. Upon not guilty pleaded, and a ſpecial verdict,

THE FIRST QUESTION was, Whether a leaſe for three lives by indenture, dated 30th *Auguſt*, 20. *Eliz.* HABENDUM *à die datus*, and letter of attorney made 1ſt *September*, 20. *Eliz.* to make livery, and livery is made accordingly, be a good leaſe? becauſe if livery had been made the ſame day it bears date, and the letter of attorney had been in the ſame deed, it had been merely void.

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THE SECOND QUESTION, Admitting that livery by letter of attorney ſubſequent be good, whether a leaſe being made by a biſhop for three lives, *viz.* to one for life, remainder to a ſecond for life, remainder to a third for life, ſo not warranted by the 1. *Eliz.* c. 10. and the ſucceſſor accept the rent: whether this be a good leaſe againſt the ſucceſſor himſelf, who accepted the rent, and ſhall bind him during his time, ſo as he cannot enter to avoid it, and make a new leaſe?

A biſhop's leaſe for three lives, *viz.* to *A.* for life, remainder to *B.* for life, remainder to *C.* for life, is void againſt the ſucceſſor.

Co. Lit. 44. b. 6. Co. 37. a. Cro. Jac. 173. Hetley, 22, 3. Com. Dig. 254. 3. Bac. Abr. 350. 366, 394.

Theſe were the points intended, and were argued at the bar, but for a fault in the leaſe whereby the defendant claimed, the matters in law were not reſolved; but judgment was given for the plaintiff, without any of the juſtices opinions concerning theſe points. The fault was, that the biſhops there uſually by one leaſe had let three manors, reſerving 32l. rent yearly, which was found to be the ancient rent; and the biſhop here makes a leaſe "HABENDUM *to* "*Thomas ap Rees* and his aſſigns, rendering to the biſhop and his "ſucceſſors *the uſual and accuſtomed yearly rent*, and the rents and ſer-"vices at the days and times uſually accuſtomed," and he doth not ſhew any rent in certain.—And becauſe the ancient rent of thirty-two pounds had been uſually paid, where the three manors were let together, and not expreſly reſerved upon this leaſe, therefore ALL THE COURT held, that this leaſe, under which the defendant claims, is a void leaſe by the ſtatute to bind the ſucceſſor; and the ſucceſſor having entered and made a good leaſe to the plaintiff, if this leaſe to the defendant be not *in eſſe*, it ought to be adjudged for the plaintiff.

A biſhop's leaſe rendering "the "old accuſtom-"ed yearly rent," without expreſsly reſerving "the ancient rent," is void by 1. *Eliz.* c. 19.—See 18. *Eliz.* c. 6.

3. Keb. 380. 3. Bac. Ab. 361. 394. 5. Co. 3. a. Cro. Jac. 111. Moor, 199. 3. Com. Dig. 252. Dougl. 573. 3. Term Rep. 665.

But, in the argument of this caſe at the bar, for THE FIRST POINT was cited *Greenwood v. Tyler* (*a*), where it was adjudged, and affirmed afterwards in the exchequer chamber upon a writ of error, that if one make a leaſe for life by indenture, dated 20th *Auguſt*, 2. *Edw.* 6. *habendum* from *Michaelmas* following for three lives, and livery be made by the leſſor after *Michaelmas*, it is a good leaſe by the indenture (for it was a leaſe by huſband and wife of the land of the wife which ought to enure by the deed, otherwiſe it had not been good to bind the wife, for it was adjudged it bound her). So it ſeemeth a letter of attorney, being two days after the deed, is as good as if it had been made in perſon.

A leaſe by indenture, dated 20th Auguſt, HABENDUM from *Michaelmas* following for three lives, and livery by the leſſor after *Michaelmas*, is good. Poſt. 165.

For THE SECOND POINT, another caſe was cited to be adjudged, *Wheeler v. Danby* (*b*), upon a ſpecial verdict in an ejectment for an acre of land in *Mayſemore*, in the county of *Glouceſter*: That whereas *Richard biſhop of Glouceſter* was ſeiſed in fee of the manor of *Mayſemore*, whereof this acre is parcel, and by indenture 8. *Eliz.* demiſed that acre to *Jaſper Danby* and *William Danby*, HABENDUM to the ſaid *Jaſper à die datus indenturæ* for his life, remainder to the ſaid *William Danby* for his life, rendering 3s. 2d. by the year, at *Michaelmas* and the *Annunciation*; and that the ſaid *Richard biſhop of*

If a biſhop grant a leaſe for life, HABENDUM *à die datus indenturæ*, with remainder over, it ſhall be intended that livery was made after *the day*, and ſo good; and if the ſucceſſor accept rent from the leſſee, it is good againſt him alſo. 1. Roll. Abr. 476. Moor, 318. Powel on Powers, 488. Hal. MSS. Co. Lit. 45. 3. Bac. Abr. 391. 394. and the caſes there cited. 3. Com. Dig. 342. Cowp. 714.

(*a*) Hob. 314. Cro. Jac. 563. Palm. 29. (*b*) Eaſter Term, 5. Jac. 1. Roll 1040. In C. B.

Glouceſter

OWEN *againſt* THOMAS AP REES.

Glouceſter died, and *Godfrey* late biſhop of *Glouceſter* was created biſhop; and having notice that divers rents of the ſaid manor were due and unpaid, commanded *J. W.* his bailiff of the ſaid manor, to receive the ſaid rents arrear, who accordingly received them, whereof the rent of the ſaid *William Danby* was amongſt others paid to the ſaid *Godfrey*, not giving notice particularly to the ſaid biſhop that the ſaid rent received of the ſaid *William Danby* was the rent of the ſaid *William*; and that the ſaid biſhop generally 43. *Eliz.* accepted of all the ſaid rents by the hand of his bailiff; and found the ſtatute of 1. *Eliz.* c. 19.; and that the ſaid *Godfrey Biſhop of Glouceſter*, 1ſt *April*, 44. *Eliz.* demiſed to the ſaid plaintiff the ſaid acre and all tithes growing thereupon for one-and-twenty years, and that the plaintiff entered and was poſſeſſed until the defendant *William Danby* ejected him; and upon this verdict judgment was for the defendant. And it was alledged at the bar that it was reſolved hereupon, that although the leaſe be for life *habendum à die datus*, yet being found *quod epiſcopus dimiſit*, it ſhall be intended, that livery was made *after the day*, and then it was a good leaſe.—SECONDLY, This acceptance of the rent by the biſhop's ſucceſſor ſhall bind him for his time, ſo as he ſhall not avoid that leaſe which was otherwiſe voidable, becauſe it is a leaſe of parcel of the demeſnes, and for two lives, the one after the other in remainder. And the copy of this record was brought me, whereby I ſaw judgment was given upon this verdict for the defendant. *But quære*, Whether it was for this cauſe alledged, or that the plaintiff's leaſe was not warranted by the ſtatute of the firſt of *Elizabeth*?

Co. Lit. 45. a. 3. Co. 59. b. 1. And. 244. Moor, 875. 1. Leon. 308. 10. Co. 62. 1. Roll. Ab. 476. Cro. Jac. 173. Carth. 16. 2. Com. Dig. 462.

CASE 25.

Anonymous.

No one can *vouch* the king, becauſe it is in the nature of an action; and if a fine be levied by the king, it ſhall be by *render*, and not by *covenant*.

NOTE. A common recovery in a writ of entry againſt *J. S.* for the manor of *D.* in the county of *Buckingham*, was endeavoured to be drawn, and ſuffered at the bar; wherein the tenant prayed *aid of the king*, by reaſon of a warranty in the king whereby he warranted that land, and granted to make recompence upon eviction; and this *ayd prayer* was to be inſtead of a *voucher*. The warranty being created by fine and recovery drawn in paper, wherein the tenant vouched THE KING, and SIR ROBERT HEATH, the king's attorney (by a warrant as he ſaid from the king), entered into the warranty, and prayed, that the demandant might count; and ſo it was drawn, that the demandant *petit verſus dominum regem*, that land (as the uſual manner of the courts in common recovery is) and that the attorney of the king voucheth over the common vouchee. But this being peruſed by the Court, although the attorney ſaid he had warrant for ſo doing, yet becauſe ſuch a courſe hath not been ſeen, nor any precedent ſhewn, that ever any ſhould count againſt the king as vouchee; and this courſe is now deviſed to bar a remainder expectant upon an eſtate-tail in the king (as a fine by the king is ſufficient to bar an eſtate-tail in him); and although it is uſed to be levied by the king, yet that is done by way of *render*, and not by an immediate writ of *covenant*; therefore THE COURT would not ſuffer this recovery to paſs; for the king ſhall

3. *Hen.* 7. pl. 14. Theolal. 64. l. 2. f. 2. 7. Co. 32. 3. Com. Dig. 432.

ſhall never render in value upon voucher; but in ſuch caſe they ought to ſue to the king by petition to have in value, and not by way of voucher. *Vide* 9. *Hen.* 6. *pl.* 3. & *pl.* 56. 25. *Edw.* 3. *pl.* 39. 39. *Edw.* 3. *pl.* 11. ANONYMOUS. Pl. Com. 553.

Smith *againſt* the Executors of Poyndreill. CASE 26.

PROHIBITION was granted upon the 23. *Hen.* 8. c. 9. for ſuing for a legacy of ten pounds in the prerogative court, whereas the parties dwell in another dioceſe. But becauſe the will was proved in the ſpiritual court, and the ſuit in the ſame court where the probate was, and there ſentence given for the legacy; and afterwards an appeal upon this ſentence to the delegates, where it was affirmed, and coſts taxed, and excommunication upon the ſentence; and in all this time, until after the ſentence in the appeal, not any endeavour made to ſtay theſe ſuits by the ſaid ſtatute; therefore having ſo long allowed the juriſdiction of the ſaid courts, he came now too late to have a prohibition. A prohibition refuſed becauſe the party applying had ſubmitted to the juriſdiction of the ſpiritual court. Poſt. 162. 339. Cro. Jac. 321. 429. 483. 5. Mod. 450. Carth. 423. 469. 4. Com. Dig. 496.

Salk. 164. Cowp. 330. 422. Dougl. 378. 1. Term Rep. 552. 2. Term Rep. 473.

And although a prohibition was before granted, becauſe the party had not notice to contradict it, yet THE COURT would not compel the party to appear and plead thereto (as is the uſual courſe in ſuch caſes); but upon motion granted A CONSULTATION. If *prohibition* be granted without notice, the Court will grant a *conſultation*.

Yelv. 79. 12. Co. 44. Cro. Jac. 429.

Sir Randolph Crew *againſt* George Vernon. CASE 27.

UPON a petition exhibited by *Roger Downs*, vice-chamberlain of *Cheſter*, to the king, he referred the conſideration thereof to THE LORD KEEPER, calling to him any of the juſtices of the benches; who thereupon called JUSTICE JONES, BARON DENHAM, JUSTICE YELVERTON, and MYSELF. A commiſſion iſſuing out of a court of equity for the examination of witneſſes, was (before 7. & 8. *Will.* 3. c. 27. ſ. 21. and 1. *Am.* c. 8. ſ. 5.) determined *ipſo facto* by the demiſe of the king; but the depoſitions taken under it *without notice* of ſuch demiſe, ſhall ſtand good and be publiſhed.

The ſole queſtion was, Whether a commiſſion iſſuing out of the court of *Cheſter*, betwixt *Sir Randolph Crew*, late Chief Juſtice, and *George Vernon*, eſquire, now one of the barons of the exchequer, to examine witneſſes in a caſe depending before the chamberlain of *Cheſter*, which was awarded in *Hilary Term*, 22. *Jac.* 1. returnable in *Eaſter Term* following, was well executed?

The commiſſioners began the examination of their witneſſes upon the 28th *March* 1625, being *Monday*, which was the day after the demiſe of KING JAMES, and continued in examination of divers witneſſes on both ſides until the *Friday* following; at which day, and not before, having notice of the demiſe of the king, they ſurceaſed, and returned all what they had done.

Upon a motion to the ſaid court of *Cheſter* for the ſuppreſſing of thoſe depoſitions, as examined without warrant, and before thoſe who had not any authority, it was agreed by all that, by the demiſe of the king, the commiſſion was legally determined without any notice, yet the ſaid *Roger Downs*, upon view of precedents out of Moor, 333. 1. Hale P. C. 499. 2. Hale P. C. 24.

THE

Sir Randolph Crew against Vernon.

THE COURT OF WARDS, where such depositions taken in that court remain, within two days after the demise of the king, and exception taken for stay of publication, RESOLVED, "That they "should stand and be published;" and, upon a certificate from the six clerks in the chancery, that they conceived it might well be done, ORDERED, "That for the more legality of the pro-"ceeding, a new commission should issue to the ancient and former "commissioners that they should examine as many of the witnesses "as were alive, reading to them the former depositions and the in-"terrogatories; and if they affirmed them, then they should stand, "if otherwise, they should be suppressed; and such depositions of "those who were dead (if any) should stand, and that they should "examine any new witnesses upon the same interrogatories, but "not upon others."

Whereupon the said *George Vernon* by petition complained to the king, and accused the said *Roger Downs* of partiality; and that the justices of assise joined with the said *Roger Downs* in making orders in this cause, and thereupon obtained another order under the king's hand to stay the former proceedings.

Afterwards the said *Downs* exhibited a petition to the king, suggesting that the former petition was scandalous to the Court, to the Justices, and to himself; whereupon this matter was referred to the examination of THE LORD KEEPER and THE JUSTICES.

And upon the examination of both petitions, and hearing counsel on both parts, THE LORD KEEPER and ALL THE SAID JUSTICES resolved, and so certified the king, that they conceived this order was just, and great reason that the depositions should stand; for although legally the commission was determined by the demise of the king (*a*), yet the commissioners not having notice thereof, and having examined concerning the same, they held, that such witnesses were duly sworn, and should be allowed, especially in a court of equity, where the proceedings be *jure naturali*, and not according to the strict course of law.

And they further certified, that no inconvenience could ensue upon such proceedings before notice of the king's demise; but if otherwise, it would draw in question many trials by verdicts of *nisi prius*, and trials and attainders upon gaol-deliveries, whereupon divers have been arraigned and executed since the king's demise, and before notice thereof; *à multo fortiori* they held, that the examination of witnesses should stand.

4. Inst. 278.

And they further certified, that they approved of the said course, that the witnesses should be called, and their former examinations and interrogatories tendered to such of them as were alive, and to enquire whether they approved of them, and not to examine them *de novo*; and of the direction to examine the new witnesses upon the same interrogatories, and not upon others, for then inconvenience might ensue.

(*a*) See now 7. & 8. Will. 3. c. 27. s. 2:. and 1. Ann. c. 8. s. 5.

And

And laſtly they humbly deſired, that to rectify the credit of *Mr. Downs* and the proceedings of the Court, his majeſty would be pleaſed to revoke his order of reſtraint, and that this certificate, now to be made, might be ſent into the county of *Derby* to be read there, and that the proceedings might be according to the former order; yet foraſmuch as the cauſe was weighty, that upon the final hearing and determination thereof, the Court might be aſſiſted by the juſtices of aſſiſe of the ſaid county, which is without prejudice to the reputation of any of them: and ſo it was certified accordingly.

SIR RANDOLPH CREW *againſt* VERNON.

Upon this conference the lord-keeper propounded this queſtion unto us: If any witneſſes examined upon ſuch an illegal commiſſion ſhould be perjured, Whether they might be puniſhed by the 5. *Eliz.* c. 9. for that perjury? And we all conceived they might; for being examined before notice of the king's demiſe, what they did was legal, as the Books are in 34. *Aſſiſ. pl.* 8. 5. *Edw.* 4. *pl.* 12. 22. *Hen.* 6. *pl.* 29.

Perjury may be aſſigned on an anſwer under a commiſſion for the examination of witneſſes, although after the commiſſion had determined by the demiſe of the king.—4. Com. Dig. 147.

Stephens *againſt* Potter.

CASE 28.

A CASE depending before the lord-keeper, and agreed upon by counſel on both ſides, and ſet down under their hands, was, That *Mr. Tate*, ſeiſed in fee of the advowſon of *Hotton*, by his deed let that advowſon and divers other lands for years to *Lord Zouch* and others for the payment of his debts, and died ſeiſed of the inheritance. Some of his lands being holden by *knight-ſervice in capite*, and his ſon and heir *Zouch Tate* within age, which was found by office, the king granted the wardſhip of body and lands to the ſaid leſſees, rendering rent to the receiver or his deputy within forty days after the Feaſts appointed for payment, with a clauſe to be void for non-payment. The rent due at *Michaelmas*, 20. *Jac.* 1. was arrear, and in *February*, 20. *Jac.* 1. the rent was paid to the receiver, and all rents after duly paid. The church becomes void during the minority of the ward, and afterward the king preſents to this church under THE GREAT SEAL, and under *the ſeal of* THE COURT OF WARDS, *ut ſupponitur* (*a*), VIZ. *Potter* under the ſeal of the court of wards, as to a church which appertained to the king *ratione minoris ætatis* of the ſaid ward, who firſt obtained inſtitution and induction; and afterward *Stephens* under the great ſeal, who likewiſe obtained inſtitution and induction.

A preſentation by the king of a church in right of a ward may be either under THE GREAT SEAL or the ſeal of the court of wards; but if it be not in right of a ward, it muſt be under THE GREAT SEAL. Poſt. 592. Moor, 476. Cro. Jac. 228. 3. Com. Dig. 899.

And, Which of theſe were parſon? was the queſtion.

And, FIRST, it was agreed, That the king may preſent to any church which he hath in right of wardſhip, either under the great ſeal or under the ſeal of the court of wards; but a preſentation under the ſeal of the court of wards, if he hath not right to preſent in right of the ward, is void, and cannot make an uſurpation, becauſe the title to the preſentation is void, and ſo no preſentation; and an inſtitution without preſentation is void, as it is held in *Green's Caſe*, 6. *Co.* 29. *b.* and 8. *Jac.* 1. in the common pleas,

(*a*) Inſtituted by 32. Hen. 8. c. 46. and abolished by 12. Car. 2. c. 24. with the tenure to which wardſhip was an appendage.

where

STEPHENS *againſt* POTTER.

where it was reſolved accordingly, that a preſentation may be under any ſeal.

A leaſe from the crown is not *void*, but *voidable* only, for non-payment of the rent according to the reſervation. Poſt. 173. 5. Co. 56. Cro. Eliz. 221. Moor, 295. Plowd. 229. Dougl. 50.

SECONDLY, It was agreed, That the leaſe for years made of the land and advowſon under the ſeal of the court of wards, is not abſolutely void by the non-payment of the rent reſerved upon the ſaid leaſe for years without office, becauſe the rent was payable to the receiver or his deputy, which is matter of fact *in pais*; for there is a difference betwixt a leaſe for years, reſerving rent payable at the receipt of the exchequer, with ſuch proviſos *ut ſupra*, and when it is payable to the receiver or his deputy: for in the firſt caſe, the payment or non-payment appears by record, and therefore to prove the non-payment there needs no office; but in the laſt caſe, the payment is to be made to the receiver or his deputy, and that appears not of record, and therefore the leaſe not void by the non-payment without office. And ſo, it was ſaid, was the reſolution in the Caſe of *Sir Moyle Finch v. Throgmorton.*

If the king's right to grant reſults from wardſhip and prerogative, Qu. Whether the grant ſhall be under the great ſeal or that of the court of wards?

THE THIRD OBJECTION was, Admitting the leaſe made of the wardſhip to be void for non-payment of the rent without office found, yet becauſe the king hath but a third part of this advowſon by the wardſhip upon the ſtatute of 32. *Hen.* 8. c. 28. againſt leaſes made for payment of debts, and hath title to preſent to the other two parts by his prerogative, which ought to be under the great ſeal (for that ſhall have the pre-eminence to be preferred in grants), Under which of theſe ſeals it ought to have been made?

Qu. Whether, if the king make a ſecond preſentation without mention or revocation of the former, it ſhall be void?—2. Roll. Abr. 188. Dyer, 339. *in marg.* Cro. Jac. 248. Bendl. pl. 279. Latch. 191. 253.

THE FOURTH OBJECTION was, That foraſmuch as the preſentation under the great ſeal, and the preſentation under the ſeal of the court of wards, were both the ſame day, and the preſentation under the ſeal of the court of wards doth not mention the firſt preſentation and revoke it, Whether it ſhall be good?

But to theſe two laſt points no opinion was delivered, becauſe the lord-keeper conceived, for the laſt reaſon, that the preſentation under the ſeal of the court of wards was void; and he eſtabliſhed the poſſeſſion with *Stephens*, the preſentee of the king under THE GREAT SEAL.

Hilary

Hilary Term,

3. Car. 1. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Sir Edward Peto *againſt* Pemberton.

CASE 1.

Michaelmas Term, 3. *Car.* 1. *Roll* .

REPLEVIN. The defendant made cognizance as bailiff to *Humphry Peto*, Becauſe that *Humphry Peto*, his father, had granted a rent-charge of 6l. 13s. 4d. to him for his life, and for forty-ſix pounds rent arrear at the *Annunciation prime Jacobi* he diſtrained, and averred the life of the grantee.

A rent-charge for life is ſuſpended by *the acceptance* of a leaſe for years of the land; and revives again by *a ſurrender* of the leaſe.
Hetley, 50. 71. Hutton, 94. 4. Co. 52. Co. Lit. 313. 8. Cowp. 482. Dougl. 50. 58. 1. Term Rep. 86.

The plaintiff confeſſeth this grant; but that afterward this land ſo charged deſcended to the ſaid *Edward Peto*, who let it to the ſaid *Humphry Peto* for five hundred years, 1. *April*, 10. *Jac.* 1. and that the ſaid *Humphry Peto* entered by virtue of the ſaid leaſe for years, and was poſſeſſed; *et hoc*, &c.

The defendant rejoins, That after this leaſe, and before any part of the rent was arrear, viz. 16. *December*, 16. *Jac.* 1. he ſurrendered *dimiſſionem prædictam* of the ſaid lands to the ſaid *Edward Peto*, *qui ad tunc et ibidem* thereto agreed; *et hoc*, &c. And hereupon the plaintiff demurred.

FIRST, It was objected, That the pleading of the ſurrender *dimiſſionis prædictæ*, and not of the tenements, or of all his eſtate therein, was not good.—*Sed non allocatur*. for the ſurrender of the leaſe implies all his eſtate and intereſt, and ſo it is intended; and although the uſual courſe is to plead ſurrender of the eſtate, yet it is all one, and ſo much is implied.

In pleading the ſurrender of a *leaſe*, it is ſufficient to ſay, *the demiſe* aforeſaid. Plowd. 194. 2. Vent. 207.

SECONDLY, It was objected, That although he hath pleaded a ſurrender, and that the leſſor agreed thereto, yet becauſe it is not pleaded that the leſſor entered, the rent which was ſuſpended remains yet ſuſpended until the leſſor enters or waives the poſſeſſion. —*Sed non allocatur*; for when he pleaded that the leſſor agreed to the ſurrender, it ſhall be intended that he entered; and it is not uſual to plead a re-entry upon a ſurrender, no more than, when a feoffment is pleaded, to plead livery and ſeiſin thereof, becauſe it is to be admitted.

In pleading a *ſurrender* of a leaſe it need not be ſhewn that the leſſor entered after the agreement to ſurrender; but the leſſor's *aſſent* muſt be ſhewn. 2. Vent. 207.

Poſt. 162. 1. Co. 52. b. 8. Co. 82. b. Co. Lit. 3.

THIRDLY, For the matter in law, when the grantee of a rent for life accepts of a leaſe for years of part of the ſame land, and ſurrender

If the grantee for life of a rent accept a leaſe of the land from the reverſioner, and the leaſe is afterwards ſurrendered, the rent revives. Ante, 83. Co. Lit. 338. Dougl. 50.

Sir E. Peto *againſt* Pamberton.

renders the ſaid leaſe, Whether the rent remains ſuſpended during the years, or be revived preſently by the ſurrender? Brampston, *Serjeant*, much urged, that it is determined during the term for years; for if he had granted this leaſe over, it had paſſed the rent incluſively; ſo in this caſe where the leſſee ſurrenders, it is *quaſi* a grant to him of the term, and therefore the rent ſhall not be revived: but he agreed, if the leaſe had been to the grantee of the rent upon condition, and the leſſor had entered for the condition broken, or had recovered in waſte, the rent had been revived, for the leaſe is abſolutely determined (*a*); but here the leſſor is in by the leſſee *quaſi* by his own act, and therefore it ſhall not be revived. —But all the Court held, that the rent was revived; for by the ſurrender and agreement of the parties the leaſe is abſolutely determined and not *in eſſe*, and none of them can ſay that it is *in eſſe*; but a ſtranger who is to have benefit thereby may well ſay that it is *in eſſe* as to him; but *quoad* the leſſor and leſſee it is determined, and the poſſeſſion and intereſt is in him without entry: wherefore it was adjudged for the avowant.

(*a*) 21. *Hen.* 7. *pl.* 7. 19. *Hen.* 6. *pl.* 4. and 45. 7. *Hen.* 6. *pl.* 2. 8. Co 145. b. Co. Lit. 338. 2. Lev. 80.

Case 2.

Standford *againſt* Coopef.

Hilary Term, 2. *Car.* 1. *Roll* 2674.

The *eſſoign day* is, in law, the firſt day of the Term; and all *legal acts* ſhall relate to that day, and not the *quarto die poſt*.

Hutton, 72. Yelv. 35. 1. Bulſt. 32. Jenk. 250. Hetley, 95. 1. Bl. Rep. 227. 496. Cruiſe on Fines, 54. Gilb. Uſes, 79. 2. Term Rep. 16. 3. Term Rep. 285.

SCIRE FACIAS upon a judgment in debt, in *Hilary* Term, 22. *Jac.* 1, againſt one *Bill*. The defendant, being returned *terre-tenant*, pleads a ſtatute acknowledged by the ſaid *Bill*, 22. *January*, 22. *Jac.* 1. and an extent by virtue of the ſaid ſtatute.

The queſtion was, If this judgment ſhall relate to the firſt day of *Hilary* Term, which was the twentieth of *January*, being *the eſſoign day*, or only to the twenty-third of *January*, which was *quarto die poſt?* for if it related to the twentieth of *January*, being the eſſoign day, it is precedent to the ſtatute.

And all the Court agreed, That the judgment ſhall have relation to *the eſſoign day*; for in law it is the firſt day of the Term, and all legal acts have relation thereunto, and the *quarto die poſt* is the day of grace, till when for divers purpoſes no party ſhall be prejudiced for not appearing; but as to common intendment, it hath relation to the eſſoign day: wherefore, being upon a demurrer, it was adjudged accordingly for the plaintiff. *Dyer*, 200. and 361. 34. *Hen.* 6. 20. 22. *Hen.* 6. 7.

Case 3.

Biggot *againſt* Smyth.

In the Exchequer Chamber.

An eſtate limited to huſband and wife for life, remainder to the *ſurvivor* of them in fee, if the huſband make a feoffment

UPON a ſpecial verdict in the exchequer was this caſe tried. A man ſeiſed of lands in fee conveys it by feoffment to the uſe of himſelf and wife, and to the heirs of the ſurvivor of them. The huſband afterwards makes a feoffment of this land, and dies; the wife enters, and dies.

The queſtion was, Whether by the wife's entry the fee ſhall veſt in her ſurviving, ſo as her heirs ſhall enjoy it?

the contingency is 378. 2. Roll. 2. Vent. 189.

deſtroyed, and the wife's entry upon his death will not ſupport the fee.—Co. Lit. 46. b. Abr. 796. 1. Co. 134. b. R. 697. 738. 2. Lev. 39. Com. Rep. 46. 3. Mod. 309. Fearne's Eſſay on Contingent Remainders, 4th edit. 7. 434. 457.

And

And IT WAS ADJUDGED, That this feoffment of the husband hath destroyed this future contingent use of the fee; for whatsoever cannot accrue at the time of the death of the party who first dieth, cannot afterwards by any act be revived, but is absolutely extinguished. And a writ of error being brought in the exchequer chamber before the lord keeper and lord treasurer of *England*, being both of them lawyers, and before the two *Chief Justices* HIDE and RICHARDSON, and before WALTER, *Chief Baron*, this judgment was this Term affirmed, as the said chief baron related to me.

L. Ray. 314. says, this case is nice to an instant, for the right ought to be precedent to support the contingency; and therefore, because the right arose to the wife *eo instante* that the contingency happened, the remainder was adjudged to be destroyed; and the case has always been held for law. See also Com. Rep. 46. Fearne, 4th edit. 457.

Sir Thomas Holt *against* Sambach.

CASE 4.

Trinity Term, 2. Car. 1. Roll 731.

REPLEVIN. Upon demurrer the case was: *Sir William Cateſby* tenant for life of the manor of *Lopworth*; remainder to *Robert* his son and heir apparent, and to the heirs males of his body; remainder to *Sir William Cateſby*, and to the heirs males of his body; remainder to the heirs of the body of the said *Robert*; remainder to the right heirs of the said *Sir William Cateſby*. The said *Sir William Cateſby* and *Robert*, being within age, join in a deed, whereby the said *Sir William Cateſby* grants, and the said *Robert* confirms, to the said avowant and his heirs, an annual rent of ten pounds by the year, payable out of the said manor of *Lopworth*, to the said defendant and his heirs, at two Feasts, *viz.* at the *Annunciation* and *St. Michael*, with clause of distress, and *nomine pœnæ* of twenty shillings for every month. *Sir William Cateſby* and *Robert* join in a fine of the said manor to the use of the said *William* and his heirs, who infeoffeth the plaintiff, and dieth. *Robert* hath issue yet living.

A rent-charge, with a *nomine pœnæ*, granted by tenant for life, confirmed by next remainder man in tail, though an infant, is good against the feoffee under a fine levied by the tenant for life and the infant in remainder, if the tenant for life hath the remainder *in fee*. But an avowry for parcel of the penalty without shewing the residue discharged, is bad.

The defendant avows for twenty shillings, parcel of five pounds due at *Michaelmas* in the second year of *James* the first; and because two hundred pounds were due *pro nomine pœnæ* for two hundred months, he avows for fifty pounds of this *nomine pœnæ*. The defendant sets forth all this matter by way of avowry, except the nonage and feoffment to the plaintiff.

Hetl. 74. Hutt. 96. Carth. 435. 3. Mod. 302. 3. Burr. 1798. Co. Lit. 28. Harg. edit. note (4). 1. Term Rep. 738. Cro. Jac. 428. 1. Co. 62.

The plaintiff, in bar of the avowry, shews the nonage of him who confirmed, and pleaded the feoffment, and averment of the life of the issue in tail.

Upon this bar to the avowry it was demurred, and argued at the bar.

The sole question was, Whether this debt be chargeable upon the feoffee? because it was granted by tenant for life, and confirmed by him in the remainder in tail, being within age at the time of the grant.

For it was agreed, if a rent be granted by tenant for life, and confirmed by him in remainder in tail within age, that it is issuing out of the estate for life only, and merely a void grant as to the remainder; and if the tenant for life purchase the remainder or reverſion and die, it shall not bind the inheritance; and although he had made a feoffment over, his feoffee, after his death, should avoid it.

Sir T. Holt *against* Sambach.

But here, becauſe he that made the grant is not only tenant for life, but hath a remainder in tail, and after that a remainder in fee, the rent is iſſuing out of all his eſtates; and although it was void as againſt *Robert* the ſon, who was next in remainder in tail, who confirmed it, yet foraſmuch as this eſtate tail is barred by the fine, and the limitation thereof to the uſe of him and his heirs who granted the rent, and the plaintiff being in as feoffee to him, the Court inclined in opinion for the avowant's right to the rent; for the eſtate tail being barred, that privilege ſhall not extend to the feoffee, for he comes in under all the eſtates of the feoffor, who granted the rent-charge, and therefore ſhall hold it charged.

An avowry for part of *a rent* or *penalty* is bad, unleſs it ſhew how the remainder was diſcharged. Poſt. 137. 436.

But becauſe the avowry was for twenty ſhillings parcel of five pounds, and the fifty pounds was parcel of the two hundred pounds penalty, and he did not ſhew that the reſidue of the penalty was diſcharged, therefore IT WAS HELD, that the avowry was ill, according to 20. *Edw.* 4. c 2. 48. *Edw.* 3. c. 3. and ſo, without regard to the matter in law, it was adjudged for the plaintiff, upon the inſufficiency of the avowry.

20. *Edw.* 4. *pl.* 2. 48. *Edw.* 3. *pl.* 3. Dyer, 65. Lutw. 535. Hutton, 96. 2. Lev. 4. Moor, 258. Cro. Eliz. 22. Yelv. 5. 1. Bulſt. 49. Ld. Ray. 155. 644 2. Elpin. Dig. 18. See 11. Geo. c. 9. ſ. 22.

Case 5.

Sir Simon Bennet's Caſe.

The dignity of *baronet* is not within the proviſion of 1. *Edw.* 6. c. 7.; for there was no ſuch title at the time the act was made. Poſt. 371.

DEBT upon an obligation. The defendant, in abatement of the writ, pleaded, that the plaintiff *puis darrain continuance* was made a baronet; and it was thereupon doubted whether the writ ſhould abate, for that the ſtatute of 1. *Edw.* 6. c. 7. recites the dignities of dukes, earls, viſcounts, barons, juſtices of both benches, and ſerjeants at law, but mentions not baronets, whereby it ſeemeth it was not a dignity known at the making of that ſtatute; but if it were a dignity then known and omitted out of the ſaid ſtatute, THE COURT then held it to be out of the ſtatute. But it was then doubted by THE COURT, Whether, if it were a dignity created after the ſtatute, the ſaid ſtatute ſhould in equity extend thereunto? And THE COURT directed, that the plaintiff ſhould demur thereunto, and upon argument it ſhould be reſolved; but in regard it was only in abatement of the writ, and it would be but a *reſpondes ouſter* though adjudged for the plaintiff, the plaintiff thereupon offered to bring a new original, and the defendant conſented to appear *gratis* thereto, and plead in bar; and ſo theſe doubts were left undetermined.

Hob. 129. Cro. Jac. 482. 1. Sid. 40. Lit. Rep. 81. 2. Hawk. P. C. 22. 270.

Case 6.

Lady Chicheſley *against* Thomſon and the Biſhop of Ely.

Eaſter Term, 2. *Car.* 1. *Roll* 302.

Special pleadings in *quare impedit*. Hetley, 17. Hutton, 96.

QUARE IMPEDIT to preſent to the church of *Wimple*; and counts, That *Sir Thomas Chicheſley* was ſeiſed in fee of the advowſon of the church of *Wimple*, as of an advowſon in groſs, and preſented *Marſhall*, and died ſeiſed, which deſcended to *Sir Thomas Chicheſley*, the huſband of the plaintiff, who upon the 20th *March*, 8. *Jac.* 1. by indenture granted it to *Thomas Eaſt* and another in fee, to the uſe of the plaintiff for her jointure, and after to the uſe of himſelf in tail, and afterwards died ſeiſed. The church becomes void by the death of *Marſhall*, wherefore it belonged to her to preſent.

The

LADY CHICHESLEY *against* THOMSON, &c.

The biſhop dies pendent the writ. The defendant pleaded, That he is *parſona imparſonata* of the ſaid church *ex præſentatione regis*; and ſhews, that *Sir Thomas Chicheſley*, the plaintiff's huſband, died ſeiſed in fee of the advowſon of *Wimple*, as of an advowſon in groſs, and of the manor of *Preſton* in the county of *Cambridge*, holden of the king by knight-ſervice *in capite*, and they deſcended to *Thomas Chicheſley*, ſon and heir, being of the age of two years; and that an office was found before the eſcheator of that county by a writ of *diem clauſit extremum*, whereby this tenure and deſcent were found, whereupon the king was ſeiſed, and preſented the defendant, who was inſtituted and inducted; ABSQUE HOC, that the ſaid *Thomas Chicheſley* granted the ſaid advowſon to *Thomas Eaſt* and the other, *prout*, &c.

The plaintiff replies, *quòd non habetur aliquod tale recordum de inquiſitione*; and it was thereupon demurred.

THE FIRST EXCEPTION was taken to the bar, becauſe he ſaith that he is *parſona imparſonata*, and doth not ſay *tempore impetrationis brevis.—Sed non allocatur*; for it is inferred by the writ brought againſt him: and if he be *parſon imparſonée* before the plea pleaded, it ſufficeth; and divers precedents were cited in the New Books of Entries, fol. 494. 405. 407. to that purpoſe.

In *quare impedit* the plea of *parſona imparſonata* need not add *tempore impetrationis brevis*; for if the defendant is ſo before plea, it is ſufficient.

SECONDLY, It was argued at the bar, that this replication of traverſing the inquiſition is not good, for there never ſhall be *a traverſe* UPON *a traverſe*. But where the traverſe in the bar takes from the plaintiff the liberty of his action, for the place, or time, or ſuch like, there the plaintiff may maintain his action for the place *or* time, and may traverſe the inducement to the traverſe, and needs not to join with the defendant in the traverſe, but, at his pleaſure, may do the one or the other. But when the inducement is made and concluded with a traverſe of a title ſhewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverſe the inducement to the traverſe. *Vide* 10. *Edw.* 4. 3. & 49. 12. *Edw.* 46. 2. *Rich.* 3. "*title Iſſue*," 121. *Dyer*, 107.— And of this opinion was THE WHOLE COURT.

In what caſes a traverſe *upon* a traverſe, or *after* a traverſe, or to the inducement of a traverſe, ſhall be allowed. Ante, 61. Poſt. 173. 586. R. 518. Jones, 216. 328. Yelv. 225. Salk. 91. 520 Fort. 349. Strange, 117. Lut. 1435. 1030. Jac. 86.

Co. Lit. 282. 303 Hob. 104. 154. Moor, 350. 428. 869. Vaugh. 62. Poph. 101. Carth 99. 1. Saund. 22. 1. Lev. 192. 2. Lev. 112. Cro. Eliz. 671. 890. Cro.

THIRDLY, It was reſolved, that foraſmuch as two titles are compriſed in the bar for the king, *viz.* the dying ſeiſed, the heir within age, and the tenure in chivalry, whereby the wardſhip is veſted in the king, and a title to preſent without office, that therefore, in the replication, they both ought to be anſwered, and it is not ſufficient to traverſe the inquiſition, but ſhe alſo ought to have anſwered to the tenure, and to the deſcent alledged of the manor, if the defendant had relied upon them; but becauſe the defendant did not rely upon them, but made them inducements to the traverſe of the grant, which is the plaintiff's title, that title ought to be maintained, and not to traverſe the inducements to that traverſe: wherefore for theſe cauſes it was adjudged for the defendant. *Vide* 37. *Hen.* 6. *pl.* 6. 24. *Edw.* 3. *pl.* 27. 46. *Edw.* 3. *pl.* 25. 40. *Edw.* 3. *pl.* 11. 9. *Hen.* 6. *pl.* 37.

In *quare impedit* declaring that *A. B.* being ſeiſed in fee preſented, &c. if the defendant alledge title in the king by inquiſition, and traverſe the ſeiſin, the plaintiff cannot traverſe the inquiſition, but muſt maintain his own title. Co. Lit. 282.

Moor, 428. Hob. 104. Poph. 101. Lut. 1438. 1633.

Case 7.

Johns *againſt* Rowe.

If a *feme covert* die inteſtate, the ordinary is compellable to grant adminiſtration *de jure* of her goods and chattels to her huſband or his repreſentatives.

Jones, 175. Co. Lit. 351. a. 1. Roll. Abr. 910. Moor, 871. 4. Co. 51. b. Dyer, 251. 1. Sid. 409. 3. Salk. 21. 1. Peere Wms. 383. Strange, 891. 1111. 1118. 3. Atk. 526. 2. Bl. Com. 504. 1. Com. Dig. 261.

UPON a commiſſion to JONES, *Juſtice*, WHITLOCK, *Juſtice*, YELVERTON, *Juſtice*, and MYSELF, and to four other doctors of law, in an appeal of adminiſtration committed by SIR HENRY MARTYN to *Anne Rowe*, niece to *Elizabeth Johns*, late the wife of *Roger Johns*, the huſband pretended that *of right* it belonged to him, and not to any of his wife's kindred; and it was divers times debated, as well by common lawyers as by doctors of the civil law.

JONES, WHITLOCK, and YELVERTON, *Juſtices*, reſolved, that of right the adminiſtration ought to be committed to the huſband, and not to any of the wife's kindred, by the ſtatute of 31. *Edw.* 3. c. 11. as to the moſt faithful friend; for as it belongeth to the wife upon the huſband's dying inteſtate, ſo it belongeth more properly to the huſband upon the wife's dying inteſtate: but they agreed, that the ſtatute of 21. *Hen.* 8. c. 5. doth not extend to compel the huſband to take adminiſtration; for that is a penal law, and extends only to the wife and kindred, and not by equity to be extended to the huſband. And for their opinion they relied upon 4. *Co.* 51. b. *Ognel's Caſe*, that the adminiſtration of the goods of the wife belongeth *in right* to the huſband.

But I doubted thereof, and was of a contrary opinion: for the ſaid book doth not give any reaſon, nor ſhew any authority to maintain it; and, in reaſon, the huſband is not to have it *de jure*, but it is in the power of the ordinary to commit the adminiſtration to him or to the wife's kindred; for if he ought to have it *de jure*, he would never ſuffer the wife to make any will for the advancement of the children by another huſband, or for her kindred; and the wife without the huſband's aſſent cannot make a teſtament, but by his aſſent ſhe may make him executor for things in action, as debts, or *des biens aſport* before the coverture; ſo it is his default if ſhe die inteſtate. Alſo the wife is to be intended to be advanced by her huſband, and to have by the cuſtom *rationabilem partem bonorum* (*a*); therefore he is not in ſuch degree as his wife, and he is not *de jure* to have the adminiſtration, but the ordinary may commit it to him if he pleaſe, or he may refuſe; and no appeal lies if the adminiſtration be not committed to him, for it is merely at the ordinary's diſcretion. And of this opinion were the civilians.

But afterwards, the ſaid THREE JUSTICES, in my abſence, reſolved for the plaintiff (*b*). *Vide* 4. *Hen.* 6. *pl.* 31. 12. *Hen.* 7. *pl.* 24. 9. *Co.* 38. 34. *Hen.* 6. *pl.* 14. 27. *Hen.* 8. *pl.* 26. 39. *Hen.* 6. *pl.* 27. 18. *Edw.* 4. *pl.* 11.

(*a*) By 22. and 23. Car. 2. c. 10. ſhe ſhall have a *third*, if there be children; if not, a moiety of her huſband's perſonal eſtate.

(*b*) By 29. Car. 2. c. 3. the huſband ſhall have adminiſtration.

Case 8.

Sir William Crayford *againſt* Sir Robert Crayford, Executor of William Crayford.

Hilary Term, 2. *Car.* 1. *Roll* 2418.

What ſhall be conſtrued an abſolute and independent covenant.

COVENANT. Whereas the teſtator covenanted with the plaintiff, That the manor of *Ridgway*, which he aſſured to the plaintiff upon his marriage, was of the value of three hundred pounds

pounds yearly; he ſaith, that in truth it is but of the yearly value of 250l. The defendant pleaded, That the ſaid manor was of the value of 300l. yearly at the time of making the ſaid indenture, *ſecundum formam et effectum indenturæ prædictæ*; and upon this they were at iſſue, and the jury find a ſpecial verdict, *viz.* The indenture *verbatim*, as the plaintiff declareth; wherein the teſtator covenanted to ſtand ſeiſed of that manor, in conſideration of marriage, to the uſe of the plaintiff and the heirs of his body; and covenants, that he was ſeiſed of the ſaid manor at the date of the ſaid indenture, of a lawful eſtate in fee, notwithſtanding any act done by him or any of his anceſtors, and that no reverſion or remainder was in the king or any other, and that the ſaid manor was "then of the "annual value of 300l. *per annum*;" and that the plaintiff and his heirs ſhall enjoy according to the limitations, diſcharged and ſaved harmleſs from all incumbrances made by him or any of his anceſtors. And further they found, that this manor was but of the value of 260l. *per annum* at the time of the ſaid indenture, and no more, and that the teſtator had not done any act to impair the ſaid value; and if *ſuper totam materiam*, &c.

SIR W. CRAYFORD *againſt* SIR R. CRAYFORD.

So the ſole queſtion was, Whether this covenant for the value depends upon the firſt part of the covenant, that "notwithſtanding "any act made by the teſtator or his anceſtors," or if it were an abſolute and diſtinct covenant of itſelf?

Cro. Jac. 644. Cro. Eliz. 44. Poſt. 496. Moor, 58. Cowp. 125. Dougl. 27. 766.

And upon the firſt argument THE COURT RESOLVED, that it was an abſolute and diſtinct covenant, and had no dependence upon the firſt part of the covenant. *Vide* 27. *Hen.* 8. *pl.* 29. 7. & 8. *Eliz.* *Dyer*, 240. 1. *Saund.* 58.

Sands *againſt* Trevilian.

CASE 9.

ERROR of a judgment in the common pleas in debt, where the plaintiff ſued the defendant, Becauſe he retained him, being an attorney in the common pleas, to proſecute ſuch a ſuit in that court betwixt one *Sims* and *Worlich*, and deſigned him to be attorney for *Worlich*, and agreed to pay him his fees; and ſheweth, that he laid out ſo much in that ſuit for *Worlich*, and that the defendant had not paid him. Upon *nil debet* pleaded, the verdict was found for the plaintiff, and judgment given.

An attorney may bring *debt* on a *retainer* for his fees; but on *a promiſe* by one man to pay *him* for buſineſs done in the cauſe of another, *caſe* only lies. Poſt. 160. 194. See Bradford v. Woodhouſe, Cro. Jac. 520. 1. Com. Dig. 453. 2. Ld. Ray. 842. 1. Term Rep. 82.

The error aſſigned was, That an action of debt lies not; for the defendant is but a ſolicitor, and there is not any conſideration; and it is maintenance in him to ſolicit ſuits. 32. *Hen.* 6. *pl.* 25. 21. *Hen.* 6. *pl.* 16.

SECONDLY, Although the defendant be ſuable for this retainer, yet it ought to be in an action upon the caſe in an *aſſumpſit*, and not in debt; for there is not any contract betwixt them.

And concerning this point THE COURT doubted, and would adviſe thereof (*a*).

(*a*) See poſt. 193. the judgment of the Court in this Caſe.

See 3. Jac. 1. c. 7. 2. Geo. 2. c. 23.

Eaſter Term,

4. Car. I. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Mynn *againſt* Coughton and his Wife.

CASE 1.

ACTION ON THE CASE. Whereas the plaintiff had recovered a debt of thirty pounds againſt *T. D.* and did thereupon ſue forth a *capias ad ſatisfaciendum*, and delivered it to the ſheriff of the county of *Cambridge*, who had arreſted and taken him in execution by virtue of the ſaid writ; that the defendants had reſcued him out of the ſaid execution, by means whereof he went at large, and cannot ſince be found, ſo as the plaintiff is defrauded of his execution.

If a defendant be reſcued after being taken upon a *ca. ſa.* the plaintiff may have an action for the miſfeaſance againſt *the reſcuers.*

Upon verdict found for the plaintiff, it was moved in arreſt of judgment, that an action on the caſe lies not againſt the defendant for this *reſcous* by the plaintiff who recovered, but his remedy is againſt the ſheriff in debt or action upon the caſe, and the ſheriff ought to have this action againſt the reſcouſſors; for there is not any reaſon the defendants ſhould be twice puniſhed, as they ſhould if the plaintiff ſhould maintain this action againſt them.

Ante, 75. Poſt. 240. Hetley, 95. Hutton, 93. 98. Cro. Jac. 419. 486. 3. Co. 52. Moor, 597. 660. 39. *Hen.* 6. 42. a. Salk. 18.

HUTTON and YELVERTON were of that opinion.

But RICHARDSON, *Chief Juſtice*, HARVEY, and MYSELF, held, that the action well lies for the plaintiff; for he is the party who hath the loſs, and to whom the injury was done; wherefore in reaſon he ought to have the action, and not be inforced to ſue the ſheriff, for perhaps the ſheriff is dead, and then no action lies againſt his executors: wherefore it is juſt that the plaintiff ſhould take his election; and if he recover, the parties may plead it if they be ſued by the ſheriff, ſo as there is not any danger of being double charged. Wherefore it was adjudged for the plaintiff (*a*).

1. Com. Dig. 204. 5. Com. Dig. 438. 2. Eſpin. Dig. 384.

(*a*) See 2. Will. & Mary, c. 5. ſ. 4. where the party grieved upon reſcous of goods diſtrained *for rent* may recover treble damages, &c.

Iſeham *againſt* Morrice.

CASE 2.

EJECTMENT by the plaintiff, leſſee of the *earl of Kent*, againſt the defendant, tenant to the *earl of Pembroke*. Upon evidence at the bar, it was held by ALL THE JUSTICES, Whereas EDWARD

A. being tenant for life of a manor, with remainder to *B.* a recovery ſuffered by *B.* of the moiety of

of two parts in three parts for life, remainder to *B.* of the third part in tail male; of the third part, but for the third part alſo.—S. C. Hetl. 81. Co. Lit. 46. b. 47. b. Cowp. 379. 1. Term Rep. 105.

earl

ISHAM *againſt* MORRICE.

earl of Salop was tenant for life of the manor of *Alveton* in the county of *Stafford*; remainder to GRACE *lady Candiſh* his ſiſter, of *two parts* thereof in *three parts* to be divided, for life; the remainder of the third part to the ſaid *Grace* and the heirs males of her body; the remainder over, &c. and ſhe by indenture inrolled bargained and ſold to the ſaid *Edward* all her moiety part and purparty of the ſaid manor, and covenants to ſuffer *a recovery* for further aſſurance, which is had accordingly, and *Grace* made the vouchee,

FIRST, That this was a good recovery of the intire third part, and not of the moiety of the third part, as it was ſtrongly urged at the bar it ſhould be.

A recovery for a *greater* portion of a manor than the party has, is good.

SECONDLY, That if one hath intereſt only in the third part of a manor, and ſuffer a recovery of the moiety of the manor, it is good for the third part.

2. Co. 4. b.

A void leaſe is good by eſtoppel, if the leſſor purchaſe the inheritance; but the jury may find the fact.

THIRDLY, That where one makes a leaſe for years of land by indenture, and hath nothing in the land, and afterward purchaſeth the land and aliens it, although it be a good leaſe for years by eſtoppel againſt him and his alienee by way of pleading, and ſhall bind them, yet it ſhall not bind the jury, but they may find the truth; and if they find the truth, the Court ſhall adjudge it to be a void leaſe.

Co. Lit. 227. 352. 2. Co. 4. b. 4. Co. 53. a. Owen, 96. Cro. Eliz. 140. 1. Leon. 206. Pollexf. 67. 3. Com. Dig. 278. 5. Com. Dig. 158. 1. Salk. 276.

Inrollment of bargain and ſale will not make an intermediate leaſe good. Poſt. 218.

FOURTHLY, That where bargainee by indenture, after the enſealing of the indenture and before the inrollment, lets the ſame land for years, and afterwards the indenture is inrolled within the ſix months, yet the leaſe is void, and the relation of the inrollment ſhall not make it good.

Cro. Jac. 52. Hob. 136. 220. Carth. 178. 2. Burr. 712. 1. Com. Dig. 541.

Ceſtui que truſt of a term purchaſes the inheritance, and levies a fine, *the leſſees* for years are barred.

FIFTHLY, That where one is leſſee for years, and aſſigns over his leaſe in truſt for himſelf, and afterwards purchaſeth the inheritance and occupies the land, and then levies a fine with proclamation, and the truſtee doth not claim his leaſe within the five years, this fine and non-claim ſhall bar the intereſt of the truſtee; for he who levied the fine hath the poſſeſſion by reaſon of the truſt, and this truſt is included in the fine, and the truſtee not making claim, his intereſt is barred thereby.

5. Co. 124. Carth. 82. 101. Plow. 374. 1. 448. 1. Wilſ. Vent. 56. 81. 2. Vent. 329. 1. Sid. 458. Hardres, 401. 1. Lev. 270. 3. Bac. Abr. 242. Ch. Rep. 51. Ambl. Rep. 699. R. 6. 230. 352. 431. Cruiſe on Fines, 193.

If a man bargain and ſell land for years, and then grant the reverſion, if the bargainee attorn to the grantee, it is a good grant of the reverſion, although the bargainee had not entered. Poſt. 400. Cro. Jac. 52. 604.

SIXTHLY, That where one by indenture, in conſideration of money, bargaineth and ſelleth, demiſeth and granteth, land for years, and the next day after, by indenture reciting that grant and demiſe, grants the reverſion to divers uſes, the leſſee attorns, it is a good grant of the reverſion, although there were not any proof that the bargainee entered before this grant of the reverſion, or that the bargainor waived the poſſeſſion; for the leſſee ſhall be adjudged in actual poſſeſſion by the ſtatute of 27. *Hen.* 8. c. 16. of uſes, and the reverſion is immediately divided from the poſſeſſion, and he hath a good reverſion; but in caſe of a leaſe for years at the common law, until the leſſee enters, or the leſſor waive the poſſeſſion, the reverſion is not divided, nor paſſeth by the words of "grant of a reverſion."

5. Co. 124. b. Co. Lit. 147. b. 270. a. 2. Vent. 35. 2. Burr. 712.

Eaton

Eaton *againſt* Ayloff and his Wife.

Case 3.

PROHIBITION was prayed, Becauſe they ſued in court-chriſtian for defamation, and ſpeaking theſe words of the plaintiff, "He was a cuckold and a wittal, which is worſe than a cuckold, "and that *Ayleſworth* had lain with *Ayloff*'s wife;" and for theſe defamatory words he ſued there.

To ſay of a woman "*ſhe is* "*a whore*," are words of heat, and not a defamation cognizable by the ſpiritual court, unleſs accompanied by the charge of ſome act of incontinency. *Sed quære.* Poſt. 339. 456.

And becauſe it was alledged, that for theſe words, being but words of ſpleen, prohibitions had been uſually granted, day was thereupon given until this Term to ſhew cauſe why a prohibition ſhould not be granted; and divers precedents were ſhewn, that for calling one "cuckold" or "whore" prohibitions have been granted.

But now upon adviſement ALL THE COURT agreed, that no prohibition ſhould be granted, but that the ſpiritual court ſhould have juriſdiction thereof: for although they held, that there ought not to have been any ſuit for the firſt words, they being too general, yet being coupled with a particular, ſhewing that the wife committed ſuch an offence with ſuch a particular perſon, they are not now general words of ſpleen in common and uſual diſcourſe and parlance; but they held it was ſuch a defamation as one is ſuable for in the ſpiritual court: whereupon the prohibition was denied.

Hetley, 74. 2. Roll Ab. 297. 2. Lev. 63. 66. Jones, 44. R. 770. 1. Sid. 248. 433. 1. Vent. 61. 220. 1. Mod. 21. Stra. 823. Bunb. 312. Salk. 692. Skin. 390. 4. Com. Dig. 507. 2. Term. Rep. B. R. 474.

BROWNLOW, *Chief Prothonotary*, produced ſeveral precedents where prohibitions had been granted to ſtay ſuits for ſuch words, viz. in *Trinity Term*, 15. *Jac.* 1. *Roll* 2260. *Purcas v. Birrell*, for that he was preſented at ſeveral inqueſts within his pariſh for being a drunkard and a barrator; and in *Eaſter Term*, 6. *Jac.* 1. *Roll* 397. a prohibition was granted to ſtay a ſuit for calling a parſon "hedge prieſt;" and *Michaelmas Term*, 21. *Jac.* 1. *Barker v. Paſmore*, for ſaying, "She is a quean, and a tainted quean," a prohibition was granted (*a*),

(*a*) See the Caſe of Cucko v. Starre, poſt. 285. and Miller v. Herbert, 1, Sid. 404. 1. Vent. 7.; and now to be ſettled, that a ſuit may be inſtituted in the ſpiritual court, not only for indeed it ſeems calling a woman *a whore*, Graves v. Blanchet, Salk. 696. but for publiſhing any words tantamount. Stra. 471. 545. 555. Carth. 498. 3. Lev. 319. 11. Mod. 213.

Trinity

Trinity Term,

4. Car. 1. In the Common Pleas.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*
Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Farrington *againſt* Keymer.

An information on 23. *Hen.* 8. c. 4. for raiſing the prices of beer, may be tried at *Weſtminſter*; for the offence is not reſtrained by the 21. *Jac.* 1. c. 4.
Poſt. 146. 603.
Hetley, 101.
Hutton, 98.
1. Sid 401.
1. Ven. 8.
1. Com. Dig. 227.
Carth. 291. 465.

INFORMATION againſt the defendant upon the 23. *Hen.* 8. c. 4. for ſelling beer at another price than is thereby appointed, which is, that "the offender ſhall forfeit ſix ſhillings for every barrel, &c. "the one moiety to the king, the other to the party who will ſue "in any of the king's courts by action of debt, &c."

After verdict at *Norfolk* aſſiſes upon not guilty, and found for the plaintiff, it was moved in arreſt of judgment, that this information was not maintainable in this court, for the ſtatute of 21. *Jac.* 1. c. 4. appoints that informations ſhall be before the juſtices of peace for ſuch matters whereof they have power to inquire, and not in the courts at *Weſtminſter*; and ſo the ſtatute being in the negative, the information is not here allowable.

But ALL THE JUSTICES reſolved, *abſente* HARVEY, that this information was well brought in this court.

2. Hale, 30.

A ſtatute giving an action wherein no protection, eſſoign, &c. ſhall be allowed, extends only to the courts at *Weſtminſter*.
Moor, 421. 6. Co 19.

FIRST, It was held, that the 23. *Hen.* 8. c. 4. which gives the forfeiture to be recovered in courts where no protection, eſſoign, &c. is allowable, extends only to the courts at *Weſtminſter*, and not to any other interior court, although *Weſtminſter* be not named; for an inferior court cannot allow *protections*, or *gager de ley*, and therefore it cannot be ſued before the juſtices of peace or *oyer* and *terminer*, as in *Gregorie's Caſe*, 6. *Co.* 19. and *Dyer*, 236.

The 21. *Jac.* 1. c. 4. does not enable juſtices of peace to proceed on ſubſequent penal ſtatutes.
3. Inſt. 193.
4. Inſt. 172.
1. Com. Dig. 123.
1. Salk. 373.

SECONDLY, It was reſolved, that the 21. *Jac.* 1. c. 4. makes not any new law to enable the juſtices of peace to meddle with informations which were not before appointed by the ſtatutes to be inquired of before them and to be ſued by informations, but only appoints, that where informations may be brought before them, or in the courts of *Weſtminſter*, at their election, there they ſhall be brought in the ſeſſions before the juſtices of the peace or of *oyer* and *terminer* in the counties where the offence was committed, and that for the eaſe of the ſubjects who be defendants.

2. Term Rep. 274. 3. Term Rep. 362. 4. Term Rep. 109.

Common brewers are not victuallers within the meaning of

THIRDLY, They all ſaid, that the principal doubt in this Caſe was, Whether the 31. *Hen.* 8 c. 10. which appoints that juſtices of the 31. *Hen.* 8. c. 10.

peace

peace may enquire, among other ſtatutes, of and upon the ſtatutes of victuals, victuallers, innholders, &c. extends to give them authority to receive informations upon the 23. *Hen.* 8. c. 4. and if *brewers* ſhall be ſaid *victuallers* within this ſtatute? And it was reſolved that they ſhould not; for this ſtatute of 23. *Hen.* 8. c. 4. is not properly againſt brewers, who are but obliquely puniſhed within that ſtatute; and the words victuals and victuallers are properly to be applied and extended againſt the alehouſe-keepers, who ſell by retail and keep not the aſſiſe, and who by the purview of the ſtatutes were enquirable before juſtices of peace, as the ſtatutes of 23. *Edw.* 3. c. 6. and of 12. *Rich.* 2. c. . and other expreſs ſtatutes are; but juſtices of peace and *oyer & terminer* are not to enquire concerning this ſtatute, which is ſuable in the courts of *Weſtminſter* only. Wherefore for *this* cauſe it was adjudged for the plaintiff. FARRINGTON *againſt* KEYMER.

Norton *againſt* Fermer. CASE 2.

PROHIBITION was granted to ſtay a ſuit for tithe of wood, upon ſurmiſe that the wood was ſpent in his houſe for firing; and ſhews, that the cuſtom in the ſame pariſh is, that the owners of any houſe and land in the ſaid pariſh who pay tithes to the parſon, ought not to pay tithes of wood ſpent for fuel in their houſes.

Wood cut for fuel or fences is titheable unleſs exempted by cuſtom. Poſt. 166. Moor, 917. 2. Keb. 628. 2. Inſt. 652. Dan. Ab. 597. Hetley, 110. Moor, 909. 917. Cro. Eliz. 605. 609. Cro. Jac. 576. 1. Sid. 447. 1. Vent. 75. Bunb. 98. 3. Com. Dig. 94. Ambler's Rep. 132.

Iſſue being upon this cuſtom, it was found for the defendant; and moved in arreſt of judgment, that although it be found there is no ſuch cuſtom, yet he ought not to pay tithes for wood ſpent in his houſe, nor for fencing-ſtuff for hedges, but *per legem terræ* ought to be diſcharged of them.

But THE COURT reſolved, that it is not *de jure per legem terræ* that any be diſcharged of them; for it is uſual in prohibitions to alledge cuſtoms, as for hearth-penny, or by reaſon of other lands whereof he pays tithes, that he is diſcharged of that tithe, but not to alledge, that *per legem terræ* he is diſcharged. And the plaintiff here having alledged a cuſtom, and being found againſt him, it was adjudged for the defendant, that conſultation ſhould be granted.

Iſabel Peel's Caſe. CASE 3.

PROHIBITION was prayed by her againſt the eccleſiaſtical commiſſioners, for that it was by articles in that court objected againſt her, that ſhe was aiding and aſſiſtant to *Sir H.* in the years 1622, 1623, until *September* 1624, to have familiar acquaintance with the *Viſcounteſs Purbeck*, with whom he committed adultery, and that ſhe was chief agent for their meetings at unſeaſonable times, by and through her private lodgings and paſſages, by means whereof they took their opportunities to commit adultery; for which offence ſhe was by the ſaid commiſſioners, upon the ſeventh day of *February* 1627, ſentenced to be guilty of bawdry and lenocynie, and fined two hundred pounds to the king's uſe, and enjoined to make ſuch a penitential acknowledgement in the *Savoy* church as the ſaid commiſſioners ſhould appoint, and to be impriſoned until ſhe found ſureties for the performance of all this ſentence:

If the judges of an inferior court exceed the juriſdiction given to them by ſtatute, any of the ſuperior courts may grant a prohibition. Ante, 47. Poſt. 220. 582. S. C. Hutt. 107. 5 Co. 51. Cro. Eliz 684. 4. Inſt. 331. 2. Brownl. 37. Rep. 3. 325.

2. Hawk. P.C. 556. 558. Powel on Dev. 690. Cowp. 424. 3. Term

Peel's Case. ſentence: and for this cauſe ſhe prayed a prohibition; for that by the general pardon, 21. *Jac.* 1. ſhe was pardoned for theſe offences committed in the years 1622, 1623, to *September* 1624: and ſhe avers, that ſhe is not guilty of any offence ſince that time.

The Court thereupon granted a prohibition: for although the time after the pardon is mentioned in the ſentence, yet it was for offences before the pardon, and ſo it ſtands well with the ſentence; and the averment makes it material: admitting alſo that part of the offences were committed after the time mentioned in the pardon, yet the fine being entire, and both the time before and after the pardon involved together,

Hutton, *Juſtice*, conceived that a prohibition ought to be granted; and for this reaſon alſo, becauſe ſhe is ſentenced to be impriſoned until ſhe find ſureties to perform the whole order, which is not warrantable: for although by the 1. *Eliz.* c. 1. ſ. 18. (*a*) the high commiſſioners may aſſeſs fines, or award impriſonment for an offence, yet they can neither commit any to priſon for the fine, nor until the parties find ſureties for the performance of their orders; but they ought to certify the fine into the exchequer, &c.

And Hutton further ſaid, it had been ruled in this court, that ſuits for adultery (unleſs ſuch only as were exorbitant and notorious) ought to be brought before the ordinary in his ſpiritual court: neither doth a ſuit for alimony in the high commiſſion court lie, for the commiſſion is grounded upon the ſtatute; and if they get commiſſions of and for other offences, then the ſtatute appoints, they have no ſufficient ground for their proceedings: and ſeveral caſes were cited to that purpoſe, *viz.* the caſe of *Doctor Conward* (*b*), who being ſued before the high commiſſioners for his wife's adultery, and for being pandar to her, a prohibition was granted; and *Condie's Caſe* of *Canterbury*, who being ſued before the high commiſſioners upon the election of a clerk, a prohibition was granted, becauſe they have not any juriſdiction for ſuch matters; and one *Balam's Caſe*, ſuit being before them for battery, a prohibition was granted, for it is no ſuch offence which the ſtatute intends to be there ſuable: whereupon in the principal caſe a prohibition was granted after divers days debating, and chiefly upon the pardon, becauſe it was not any of the offences excepted therein. —Note alſo, that *Elizabeth Aſh* had a prohibition upon the ſame ſurmiſe, being joined in the ſame ſentence.

(*a*) Repealed by 16. Car. 1. c. 11. ſ. 3. (*b*) 2. Brownl. 37.

Denn's

Denn's Caſe.

CASE 4.

THE CASE was thus: *Thomas Denn* being ſeiſed of certain lands in fee, and poſſeſſed of divers goods, deviſed the ſame for the payment of his debts and legacies; and, they being paid, the reſidue and ſurplus thereof to his wife, who he made his ſole executrix, and died; and his wife, ſurviving him, alſo died before probate or any election. The brothers and ſiſters of the woman laboured to get adminiſtration *cum teſtamento annexo*. The plaintiff, who was brother and heir to *Thomas Denn*, ſuggeſting that the will was revoked, and that however the ſpiritual court had no cognizance of the probate of wills concerning lands, they not being teſtamentary, prayed a prohibition; which was granted: for when the queſtion is, Whether a will made of lands and goods be revoked? it is properly triable at the common law; but if the queſtion be, Whether a will of goods only be revoked? it is properly triable in the ſpiritual court; for they having cognizance of the principal matter, ſhall try alſo the acceſſories. And it was ſaid at the bar, that they in the ſpiritual court will deny the plea of the revocation of a will, or at leaſt will enforce to prove it by ſuch witneſſes as are not to be excepted againſt in their law, as ſervants, or kindred, or legataries, and yet thoſe witneſſes are allowable at the common law: and being prayed that the prohibition might be granted to extend only *quoad* the lands, it was denied, and was granted generally for both; for when it is one entire will of lands and goods, and the allegation is to revoke it entirely, it ſhall not be diſjoined in the prohibition: but if one make ſeveral wills, one of his land, another of his goods, and revocation is alledged of both, there a prohibition ſhall be granted for the one, and denied for the other.

The ſpiritual court ſhall not be prohibited from aſcertaining the validity of a will for things perſonal, though land be alſo thereby deviſed; but they cannot meddle with a will of lands only. Ante, 94. Poſt. 165. 396. Hetley, 113. Jones, 223. 6. Co. 23. b. Cro. Jac. 346. 1. Roll. Ab. 21. 2. Roll. Ab. 315. Palmer, 120. Salk. 552. Hard. 313. 1. Mod. 90. 4. Com. Dig. 511. Cowp. 424. 2. Term Rep. 473. 3. Term Rep. 3. 315.

Brown *againſt* Hancock.

CASE 5.

ASSUMPSIT. After verdict for the plaintiff, it was moved in arreſt of judgment, that the promiſe is alledged to be made beyond the time limited in the ſtatute of 21. *Jac.* 1. c. 16. and the action is not brought within the time limited thereby.

ALL THE COURT held, that if it appear ſo by the plaintiff's own ſhewing, that the action is not brought within the time limited by the ſtatute, the plaintiff cannot maintain his action, but judgment ſhall be given againſt him: or if the contract in the *aſſumpſit* or *debt* be alledged to be within the time limited by the ſtatute; and upon "*non debet*" or "*non aſſumpſit*" pleaded, it appears upon the evidence (*a*) that the *aſſumpſit* or contract was beyond the time limited, the action lies not, and the defendan ſhall take advantage thereof, if it be ſpecially found by the jury; for the ſtatute is in the negative, "that he ſhall *not* maintain ſuch an action but within the "time limited by the ſtatute:" but in the principal caſe it appeared upon the view of the record, that the action was brought within the time limited; and therefore it was adjudged for the plaintiff.

In *aſſumpſit*, if it appear by the declaration that the cauſe of action did not ariſe within *ſix years*, the action cannot be maintained. Hetley, 111. 1. Vent. 191. 1. Lev. 101. 1. Com. Dig. 154. Dougl. 654. 3. Term Rep. 124.

(*a*) *Sed vide* Bull. N. P. 148. that the ſtatute muſt be *pleaded*.—*Sed vide* poſt. 260. 163. 294. *contra*.

Homes

CASE 6.

Homes *againſt* Savill.

Aſſumpſit upon "*an account ſtated*" need not ſpecify the particular matters and cauſes of which it is compoſed. Ante, 6. 31. S. C. Hetl. 106. 113. Hob. 88. Poph. 197. Latch. 141. Palm. 442. Yelv. 70. Roll. Rep. 306. 596. Cro. Jac. 69. 207. Dougl. 4. 727. 1. Term Rep. 42. 2. Term Rep. 479.

ASSUMPSIT. Whereas divers reckonings and accompts were between the plaintiff and defendant, and at ſuch a day, year, and place, they *inſimul computaverunt* for all debts, reckonings, and demands; and the defendant upon the ſaid accompt was found to be the ſum of twenty pounds in arrear to the plaintiff; in conſideration whereof he promiſed to pay to the plaintiff the ſaid debt. &c. That the defendant *licèt ſæpius requiſitus* had not paid, *per quod actio ei accrevit, &c.*

The defendant pleaded *non aſſumpſit*; and it was found againſt him: and it was moved in arreſt of judgment, that this action is not maintainable; for he ought to have ſpecified the particular matter and cauſes, VIZ. *pro mercimoniis venditis*, or otherwiſe; wherefore he ſhould have an accompt, otherwiſe it lies not.

But THE WHOLE COURT delivered their opinions to the contrary, that foraſmuch as the accompt may be for divers cauſes, and ſeveral matters and things may be included and compriſed therein, which *in pede compoti* is reduced to a ſum certain, wherein it certainly appears he remains and ſtands indebted, it is a ſufficient ground to maintain the action, without expreſſing the particulars for which they accompted: for proof whereof divers precedents were produced where ſuch actions brought have been adjudged good. Whereupon judgment was given for the plaintiff.

CASE 7.

Taylor *againſt* Page.

After *quod computet* in an action of accompt nothing ſhall be allowed as a diſcharge before auditors which might have been pleaded to the action. Lut. 52. S. C. Hetl. 114. 1. Roll. 87. 126. Bull. N. P 128. Cro. Eliz. 830. Strange, 680. 3, Wilſ. 73. for what may be pleaded before auditors. See 1. Com. Dig. "Accompt," (E. 11, 12, & 13.) and 1. Bac. Abr. 21. Cowp. 728.

ACCOMPT, upon receipt of divers ſums. The defendant pleaded "*nunques ſon receivor*;" and found againſt him: and, being adjudged to account before auditors, he pleaded, that after the receipt, and before the action brought, he had put himſelf in arbitrament for all treſpaſſes, debts, accounts, and actions, &c. who arbitrated, that he ſhould pay ten pounds only in diſcharge of all treſpaſſes, debts, accounts, and actions; which he paid accordingly.

Whereupon it was demurred:

And without argument ADJUDGED for the plaintiff; for this arbitrament before the action ought to have been pleaded in bar of the action; which being omitted, he hath loſt the advantage thereof, and ſhall never plead it before the auditors. Whereupon it was adjudged for the plaintiff. *Vide* 22. *Hen.* 6. *pl.* 55. 1. *Edw.* 5. *pl.* 2. 21. *Hen.* 7. *pl.* 31.

AFTER

AFTER Trinity Term,

4. Car. 1. In Serjeants-Inn Hall,

AT A

MEETING OF THE TWELVE JUDGES.

THE KING'S BENCH.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir John Doderidge, *Knt.*
Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
} *Juſtices.*

THE COMMON PLEAS.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir Richard Hutton, *Knt.*
Sir Francis Harvey, *Knt.*
Sir George Croke, *Knt.*
Sir Henry Yelverton, *Knt.*
} *Juſtices.*

THE EXCHEQUER.

Sir John Walter, *Knt. Chief Baron.*

Sir Edward Bromley, *Knt.*
Sir John Denham, *Knt.*
Sir George Vernon, *Knt.*
Sir Thomas Trevor, *Knt.*
} *Barons.*

The Caſe of Hugh Pine, Eſq.

CASE 1.

WILLIAM COLLIER, attending *Mr. Pine* at his houſe in the country, was demanded of him, Whether he had ſeen the king at *Hinton*, or no? *Collier* anſwered, That he had ſeen the king there. *Mr. Pine* replied, "Then haſt thou ſeen as unwiſe a "king as ever was, and ſo governed as never king was; for he is "carried as a man would carry a child with an apple; therefore "I and divers more did refuſe to do our duties to him."

After which words ſpoken, *William Collier*, meeting with *Richard Collier* his brother, aſked him, Whether the king were not a wiſe king? who anſwered, "Yes, he was a wiſe and temperate king."

After which, at another time, *Monſieur Sabiza* being at *Mr. Pawlett*'s houſe, at *Hinton*, *Mr. Pine* aſked *Collier*, Whether the king was there, or no? who anſwered, that he heard he was. *Mr. Pine* replied, That he could have had him at his houſe, if he would, as well as *Mr. Pawlett*.

At another time one *George Morley*, a locksmith, being at *Mr. Pine*'s houſe, he aſked him, "What news?" whereunto he anſwered, That he heard the king was at *Mr. Pawlett*'s, at *Hinton*. Then *Mr. Pine* ſaid, "That is nothing; for I might have had "him at my houſe, as well as *Mr. Pawlett*, for he is to be carried "any whither." And then *Mr. Pine* ſaid aloud, "Before God, he "is no more fit to be king than *Hickwright*." This *Hickwright* was an old ſimple fellow who was then *Mr. Pine*'s ſhepherd.

Theſe words being thus proved by *William Collier* and *George Morley*, all the Judges were commanded to aſſemble themſelves, to conſider and reſolve what offence the ſpeaking of thoſe words were.

Speaking words in contempt or diſgrace of the king's perſon, importing perſonal vice or moral defect, is not an overt act of compaſſing or imagining his death; for words ſpoken of the king, except they are relative to ſome treaſonable act or deſign then in agitation, cannot of themſelves be *high-treaſon*, but amount to a *miſdemeanor* only.

2. Roll. 89.
1. Hale P. C. 118.
3. State Trials, 733.
Foſter, 199. 202. 312.
1. Hawk. P. C. 57. 93.
1. Bl. Rep. 37.
4. Bl. Com. 80.
Salk. 631.

PINE's CASE. Whereupon SIR NICHOLAS HYDE, *Chief Juſtice* of the king's bench; SIR THOMAS RICHARDSON, *Chief Juſtice* of the common pleas; SIR JOHN WALTER, *Chief Baron* of the exchequer; SIR WILLIAM JONES, one of the juſtices of the king's bench; SIR HENRY YELVERTON, one of the juſtices of the common pleas; SIR THOMAS TREVOR, and GEORGE VERNON, barons of the exchequer, none other of the Judges being then in town, met at *Serjeants-Inn*, in *Fleet-ſtreet*, where they debated the caſe amongſt themſelves, in the preſence of SIR ROBERT HEATH, the attorney-general; and divers precedents were then produced, *viz.*

CASE 2.

The Caſe of Juliana Quick.

KANC.

Anno viceſimo primo Henrici Sexti.

To accuſe the king of having committed murder was formerly high-treaſon.

JULIANA *filia* WILLIELMI QUICK, *et alii falſi proditores incogniti in occulto machinantes mortem regis, &c. prædicta* JULIANA *ex aſſenſu* WILLIELMI, *et aliorum proditorum ignotorum, eidem domino regi, ut fuit equitans in via adheſit, et dixit eidem domino regi,* "HARRY OF WINDSOR, ride ſoberly, thy horſe may ſtumble and "break thy neck." And when the noble *John Beauchamp* then ſaid to her, "To whom ſpeakeſt thou?" ſhe anſwered, "To that "proud boy in red, riding on horſeback," pointing with her hand to the ſaid king. And further calling out to the ſaid king, ſaid, "It becometh thee better to ride to thy uncle, than that thy uncle "ſhould ride to thee; thou wilt kill him, as thou haſt killed thy "mother: ſend to thy uncle's wife, whom thou keepeſt from "him. Thou art a fool, a known fool throughout the whole
3. Inſt. 14. "kingdom of *England*." She had *pain fort et dure* becauſe ſhe would not plead (*a*).

(*a*) A priſoner ſtanding mute in high-treaſon is *ipſo facto* attainted. 2. Hale, 286. 4. Bl. Com. 348.—And in felony and piracy ſuch obſtinacy amounts to a conviction, by 12. Geo. 3. c. 20. See 2. Hawk. P. C. ch. 30. 8vo. edit.

CASE 3.

Thomas Kerver's Caſe.

BERKSHIRE.

In the twenty-firſt year of Hen. 6.

Indictment for accuſing the king of being unequal to the duty of his office, and neglecting the intereſts of his kingdom.

THOMAS KERVER *indictatur, pro eo quod ipſe proditorie dixit verba ſequentia,* "Woe to the kingdom where a child is king." *Et iterum dixit,* "It had been better for the kingdom of *England* "by an hundred thouſand pounds, if the ſaid king had been dead "twenty years before." *Et iterum,* "It had been better for the "ſaid kingdom by an hundred thouſand pounds, if the ſaid king "never had been born." And, "That *the Dauphin* of *France* was "in *Aquitain* and *Gaſcoyn*, with a great power, and valiantly fighting, poſſeſſing himſelf of the land of the king of *England* in "*Aquitain* and *Gaſcoyn*. And if the ſaid king were but of as much "humanity as *the Dauphin*, who is of his age, the ſaid king might "quietly and peaceably hold and enjoy his ſaid lands." To this he pleaded *not guilty*, and was committed to the conſtable of the *Tower* of *London*; and afterward recommitted to *Wallingford Caſtle* —*Ideo nil ultra apparet.*

John

John Clipſham's Caſe.

CASE 4.

SUSSEX.

In the twenty-ninth year of Hen. 6.

JOHANNES CLIPSHAM *indictatur, pro eo quod ipſi et alii dixerunt, quod dominus rex non fuit de poteſtate, nec ſcientia, ad regnum* ANGLIÆ *gubernandum, et quod noluerunt ulterius obedire regi, nec gubernationi ſuæ, infra idem regnum ; minanteſque inter ſe veros populos domini regis de comitatu* KANCIÆ, *pro eo quod ipſi noluerunt reſiſtere ipſum regem de juſtitia ſua infra eundem comitatum, ac ſimiliter inſurrexerunt, &c.*

Indictment for ſaying that the king has not ſufficient knowledge, &c.

The Mirfields' Caſe.

CASE 5.

SUSSEX.

In the twenty-ninth year of Hen. 6.

JOHANNES MIRFIELD *et* WILLIELMUS MIRFIELD *indictantur, pro eo quod dixerunt,* "That the king was a natural "fool, and would oftentimes hold a ſtaff in his hand, with a bird "over the end, playing therewith as a fool; and that another king "muſt be ordained to rule the land; ſaying, That the king was "not a perſon able to rule the land." *Et ulterius dixerunt,* "That "the charter that the king made at the firſt inſurrection was falſe; "and that he and his fellowſhip would ariſe again; and when they "were up, they would not leave any gentleman alive but ſuch as "they liſt, &c."—*Per indictam. ſeſſion.* SUSSEX.

Indictment for ſaying that the king was a natural fool, &c

Bretenham's Caſe.

CASE 6.

NORFOLK.

In the thirty firſt year of Hen. 6.

WILLIELMUS BRETENHAM *generoſus indictatur, pro proditoriis verbis,* VIZ. *quod* "RICHARDUS DUX EBORUM *extra* "*terram* HIBERNIÆ *infra quindecem dies tunc proxime ſequentes veniret* "*et coronam dicti domini regis de eodem rege auferret, et illud ſuper ca-* "*put ejuſdem ducis infra brevi poni facerit.*"—NOTATUR *in margine indictamenta ſic, treſpas enormia, contempt. et alia offence. Tamen in indictamento eſt* "*proditorie loquebatur, &c.*"

Indictment for ſaying that a pretender to the throne would ſeize the crown, &c.

William Aſhton's Caſe.

CASE 7.

SUFFOLK.

In the thirty firſt year of Hen. 6.

WILLIELMUS ASHTON *miles indictatur, pro eo quod ipſe et alii proditorie diverſas billas et ſcripturas in rythmis et balladis factas et fabricatas, ſuper oſtia et feneſtras diverſorum hominum poſuerunt, recitantes in eiſdem, quod dominus rex, per conſilium* DUCIS SUFFOLCIÆ, EPISCOPI SARUM, EPISCOPI CICESTRIÆ, DOMINI DE SAY, *et aliorum de concilio domini regis exiſtent. vendidit regna* ANGLIÆ *et* FRANCIÆ; *et quod* REX FRANCIÆ, *avunculus regis, regnaret ſuper dictum regem, dicentes et ſcribentes hæc omnia et ſingula. Et ſimiliter miſerunt literas hominibus de* KANC. *ad inſurgendum erga regem, ad adjuvandum* DUCEM EBORUM, *&c. ad guerram levandum. Per indictamentum Suff. anno* 31. *H.* 6.

Indictment for high-treaſon for compoſing and publiſhing ſongs purporting that the king had ſold the nation, &c.

Case 8.

John Gayle's Case.

Essex.

In the thirty-fourth year of Hen. Sexti.

Indictment for saying that the king and his privy council were false, &c. &c. &c.

JOHANNES GAYLE *indictatur, pro eo quod ipse et* ALII *dixerunt, quod* "*dictus rex, et omnes domini sui circa personam suam, et consilium suum, falsi sunt, et quod ipsi petitiones suas, in ultimo parliamento dicti regis, apud* WESTMONASTERIUM *tentum, per ipsos et totam communitatem* KANCIÆ *petitionat. &c. invitis dentibus dicti regis habere voluerunt: et quod non licet episcopis dicti regni ullam potestatem, nec aliquam congregationem populi erga ipsos ad perturbandum de bonis propositis suis perimplendis, assemblare, nec retinere. Quodque presbyteri totius* ANGLIÆ *nulla bona nec catalla, præter cathedram et candelabrum, ad inspiciendum super libros suos haberent et possiderent. Ac quod* JOHANNES MORTIMER, *alias* CADE, *est vivens; et quod ipse esset eorum capitalis capitaneus in omnibus propositis suis perimplend. credentes, et dicentes, quod ipsi essent infra tres dies quinque millia hominum armatorum: et similiter guerram erga regem levarent.*"—*Habuerunt chartam allocationis eodem Termino.*

Case 9.

Oliver Germaine's Case.

Wiltshire.

In the second year of Edw. 4.

Indictment for saying a king *de facto*, and not *de jure*, was the rightful king, &c.

OLIVERUS GERMAINE, taylor, *et alii falsi proditores, machinantes et proponentes quomodo regem* EDVARDUM, *&c. destruere potuerunt; et* HENRICUM SEXTUM, *nuper* DE FACTO, *et non* DE JURE, *regem* ANGLIÆ, *inimicum regis* ANGLIÆ, *authoritate parliamenti reputat. et approbat. infra regnum* ANGLIÆ, *extra regnum* SCOTIÆ *reducere, et regem* EDVARDUM *deponere, &c. mortem regis compasser, &c. credentes et dicentes inter se, in prophesiis, ut falsi heretici, quod dominus* HENRICUS, *nuper rex, infra breve esset eorum rex in regno* ANGLIÆ *sicut prius, et coronam suam in eodem regno haberet et retineret, dicentes hæc omnia ea intentione, quod veri populi domini regis cordialem amorem extraherent.*—JUDGMENT, *to be hanged, drawn, and quartered.*

Case 10.

William Belmyn's Case.

Norfolk.

Anno nono Edvardi Quarti.

Indictment for making and publishing certain articles, &c.

WILLIELMUS BELMYN, *de Norwico*, mercer, *indictatur, quod cum* ROBERTUS *de* Ryddesdale, *à diuturno tempore propenens statum et dignitatem regis* EDVARDI QUARTI, *&c. adnihilare, &c. et ipsum regem per guerram, &c. de regali, &c. privare, &c. inter alias falsas proditiones, &c. diversos articulos proditorum, &c. fabricavit, publicavit, et proclamavit. Et quod prædictus* WILLIELMUS *quandam scedulam tenorem prædictorum articulorum continent. apud N. &c. monstravit et publicavit, et eosdem articulos pro bonis articulis, et communi utilitate regni expedientes affirmavit, et quamplures personas ad ipsos articulos manutenendum et approbandum excitavit.*—NOTA, *Non dicitur* PRODITORIE *in eodem indictamento.*

The

Collingbourn's Caſe.

CASE 14.

LONDON.

Hilar. an. ſecun. Ricardi Tertii.

Indictment for procuring perſons to go abroad and to publiſh ſlander againſt the king and his government.

WILLIELMUS COLLINGBOURN, *nuper de* LYDYARD, *in comitatu* WILTS, *armiger, et alii falſi prod tores, mortem regis et ſubjectionem regni proditorie imaginaverunt et compaſſi fuerunt: et ad illud perimplendum, excitaverunt, &c. quendam* THO. YATE *ei offerendo octo libras ad partes tranſmarinas exire; ad loquendum ibidem cum* HENRICO *nuncupante ſe comit.* RICHMUNDIÆ, *et aliis, &c. proditorie attinct. per parliamentum, &c. ad dicendum, quod ipſi cum omni poteſtate, &c. revenirent in* ANGLIAM *citra feſtum Sancti* LUCÆ *Evangeliſtæ, et totum integrum redditum totius regni* ANGLIÆ, *de Termino Sancti Michaelis, &c. in eorum relevamen haberent. Et ulterius, ad demonſtrandum eis, quod per conſilium ipſius* WILLIELMI COLLINGBOURN, *ſi dictus comes* RICHMUNDIÆ, *et alii, &c. ad terram* ANGLIÆ, *apud* POOLE, *in comitatu* DORCESTRIÆ, *arrivare voluerunt, ipſe* WILLIELMUS COLLINGBOURN *et alii proditores, eis aſſociando commotionem populi ipſius regis, inſurrectionem et guerram erga ipſum regem interim levare cauſarent; et partem ipſorum falſorum proditorum contra regem in omnibus acciperent; et omnia infra regnum* ANGLIÆ *ad eorum diſpoſitionem eſſent. Et ulterius, ad dicendum et demonſtrandum dictis prodi teribus, &c. ad deſtinandum* JOHANNEM CHEYNEY *uſque ad regem* FRANCIÆ, *ad demonſtrandum ſibi, quòd ambaſſiatores ſui in* ANGLIAM *à dicto rege* FRANCIÆ *venientes defraudari debeant; et quòd rex* ANGLIÆ *nullum promiſſum eis cuſtodiret, ſed ſolummodo ad depenendum ſeu ad reſpectuandum guerram inter dominum regem tempore hyemali, eò quòd in principio temporis æſtivalis* ANGLICA *poteſtas in omnibus preparari poſſit ad bellum dicto domino regi* FRANCIÆ *prebendum, & eundem regem & terram ſuam adtunc finaliter deſtruendo. Et ulteriùs ad adviſandum ipſum regem* FRANCIÆ *ad auxilium dictorum proditorum pecuniis, &c. ut ipſe iter regis* ANGLIÆ *uſque terram* FRANCIÆ *impedire proponct. Et ſic prædictus* WILLIELMUS COLLINGBOURN *& alii fuerunt proditoriè adhærentes, &c. Et quòd prædictus* WILLIELMUS COLLINGBOURN, *et alii falſi proditores, Deum præ oculis, &c. à diuturno tempore intendens per cevinam aſſenſum et voluntatem diverſorum aliorum proditorum eiſdem proditoribus adhærentium, &c. aſſociaverunt, et mortem regis per guerram, commotionem, et diſcordiam inter regem et ligeos ſuos infra regnum* ANGLIÆ *levandum, compaſſi fuerunt, &c. Et ad illud perimplendum, prædictus* WILLIELMUS COLLINGBOURN, *et alii, diverſas billas et ſcripturas in rythmis et balladis de murmurationibus, ſeditionibus, et loquelis, et proditoriis excitationibus, falsò et proditoriè fecerunt, ſcripſerunt, et fabricaverunt, et illas per ipſos ſic factas, ſcriptas, et fabricatas, die, &c. ſuper diverſa eſtia eccleſiæ cathedralis ſancti* PAULI, LONDON. *proditoriè poſuerunt, et publicè ibidem fixerunt, ad movendum et excitandum ligeos regis billas et ſcripturas illas legentes et intelligentes, commotionem et guerram erga ipſum regem facere et levare, contra ligeanciæ ſuæ debitum, et finalem deſtructionem regis, et ſubverſionem regni, &c.*— JUDGMENT, *to be hanged, drawn, and quartered.*

BURDET'S CASE.

cipem interficere propoſuit. Et ad illud falſum nefandum propoſitum ſuum finaliter perimplendum, prædictus THOMAS BURDET *diverſas billas et ſcripturas in rythmis et balladis de murmurationibus ſeditionibus et proditoriis excitationibus, factas et fabricatas apud* HOLBORN, *et villam* WESTMONASTERII *prædict. falſo et proditorie diſperſit, projecit, et ſeminavit dicto ſexto de Martii, ac quinto et ſexto diebus Maii, dicto anno decimo ſeptimo, ad intentionem quod populi domini regis cordialem amorem ab ipſo rege retraherent ac ipſum relinquerent, ac erga ipſum regem inſurgerent, et guerram erga ipſum regem levarent, in finalem deſtructionem ipſorum regis ac domini principis, et contra ligeanciam ſuum, necnon contra coronam et dignitatem ipſius regis.*—JUDGMENT, *to be hanged, drawn, and quartered.*

See 3. vol. Hume's Hiſt. Eng. p. 273.

CASE 12.

The Caſe of John Alkerter.

KANC.

Anno decimo octavo Edvardi Quarti.

Indictment for ſaying that Edward the fourth procured the death of the duke of Clarence, &c.

JOHANNES ALKERTER, *yeoman, nuper ſerviens* RICHARDI *comitis* WARWICI ET SARUM, *à diuturno tempore proponens ſtatum regis pejorare et de regimine, &c. quantum in ſe fuit proditorie; per diverſa verba nefanda, et alia dicta ſua venenoſa, de diverſis murmurationibus ſeditionibus proditorum excitationibus factis et fabricatis, à gubernatione privare, &c. ad intentionem quod populi ejuſdem regis cordialem amorem retraherent, per diſcordiam inter regem et populum ſuum movendum, proditorie dixit* WILLIELMO PEND, WILLIELMO FOWLE, *et* SAMPSONI HALK, *ſub hac forma,* VIZ. *quod* WILLIELMUS PEND *et* JOHANNES ALKERTER *olim ſervientes dicti* RICHARDI *comitis* WARWICI *fuerunt, et nunc quod idem comes diem ſuum clauſit extremum; et hoc non obſtante infra breve haberent comitem* OXONIÆ (*qui ſuperſtes eſt*) *infra hoc regnum* ANGLIÆ, *qui in futuro parcellam hujus patriæ gubernet; affirmandoque ulterius verba ſua cuidam* GALFRIDO PEKE, *quod* EDVARDUS *quem vos vocatis regem* ANGLIÆ *falſo fuit, &c.; dicendo, quod idem* EDVARDUS *per ſubtilem artem ſuam eundem* COMITEM WARWICI *interfecit et murdravit, ac fratrem ſuum, nuper* DUCEM CLARENCIÆ, *ad mortem ſimili modo traxit, non habens cauſas nec aliquam veritatem; et dicendo, quod quicunque inheritabilis ſit directe poſt mortem naturalem* HENRICI SEXTI (*nunc de facto, et non de jure,* REGIS ANGLIÆ), *ad coronam* ANGLIÆ *ille tantummodo ſineret et ſuus homo eſſet. Et multa alia hujuſmodi verba proditorie dixit.*—UTLAGATUS FUIT, *prout patet per rotul. ſeſſion. Kanc. anno* 18. *Ed.* 4.

CASE 13.

Thomas Hever's Caſe.

KANCIÆ.

Anno decimo octavo Edvardi Quarti.

Indictment for ſaying that the parliament were more than any former parliament, &c.

THOMAS HEVER *indictatur, pro eo quod proditorie dixit,* "*Quod* "*ultimum parliamentum domini regis, apud* WESTMONASTERIUM "*tentum, magis ſimplex et inſufficiens fuit quam unquam antea.*" *Et ulterius,* "*Quod dominus rex propoſuit moram ſuam infra comitatum* "KANCIÆ *trahere et amorem ligeorum ſuorum ibidem habere, quia amo-* "*rem cordialem infra eandem civitatem non habuit, nec in futuro habebit:* "*et quod ſi epiſcopus* BATHONIENSIS *moriatur, quod tunc immediate* "THOMAS *archiepiſcopus* CANTUARIENSIS *et cardinalis* ANGLIÆ "*caput ſuum amitteret*" *Et multa diverſimoda verba proditoria de rege quam alia verba malitioſa de dominis ſuis, tam ſpiritualibus quam temporalibus.*—UTLAGATUS, *prout patet per rotul. ſeſſionis.*

Collingbourn's

fuit, et dicebat hæc verba ANGLICANA, "I marvel greatly that the "indictment againſt the lord marquis was ſo ſecretly handled, and "to what purpoſe? for the like was never ſeen."—*Per bagam ſeſſionis tent. coram* THOM. AUDLEY, *cancellar. et aliis*, 30. *Hen.* 8. MARCH and CAREW'S CASE.

The Caſe of John Rugg. CASE 18.

BERKSHIRE,

In the thirty-firſt Year of Henry 8.

JOHN RUGG, *chivaler*, for theſe words, "The king's high- "neſs cannot be ſupreme head of the church of *England* by God's "law." HUGO, abbot of *Reading*, *ſuperinde dixit*, "What did you "for ſaving your conſcience when you were ſworn to take the "king for ſupreme head?" *Et ſuperinde prædictus* JOH. RUGG *dixit*, "I added this condition in my mind, to take him for ſu- "preme head in temporal things, but not in ſpiritual things."—*Per indictam. Mich.* 31. *Hen.* 8. Indictment for denying the king's ſupremacy.

The Caſe of Robert Rumwick. CASE 19.

KENT,

In the thirty-firſt Year of Henry 8.

ROBERTUS RUMWICK *indictatur*, *Quòd cum diverſi fuerunt comedentes et compotantes, &c.* THOMAS BROOK, *tenens quendam ciphum cervifiæ implętum, &c. dixit*, "God ſave the king! here is "good ale." *Ad quod prædictus* ROBERTUS *dixit proditorie, &c. deſiderans mortem regis, &c.* "God ſave the cup of good ale! for "KING HENRY ſhall be hanged when twenty others ſhall be "ſaved." *Cui prædictus* THOMAS *dixit*, "Knoweſt thou what "thou ſayeſt?" *Prædictus* ROBERTUS *iterum dixit ut ſupra*, "God, &c." Indictment for ſaying the king ſhall be hanged.

The Caſe of Lionel Haughton. CASE 20.

LEICESTER.

Anno tricesimo tertio Henrici Octavi.

LIONELLUS HAUGHTON, *nuper de* ORMESKIRK, *in comitat.* LANCASTRIÆ, taylor, *pro verbis*, VIZ. being ſhooting at the butts, ſaid, "I would the king's body had been there as the arrow "did light;" AND, "By the maſs I would it had been in his "his body."—*Per indictament. Mich.* 33. *H.* 8. Haughton's Caſe.

The Caſe of Edward Peacham. CASE 21.

EDWARD PEACHAM was indicted of treaſon for divers trea- ſonable paſſages in a ſermon which was never preached, or in- tended to be preached, but only ſet down in writings, and found in his ſtudy: he was tried and found guilty, but not executed.—NOTE, That many of the Judges were of opinion, that it was not treaſon. Peacham's Caſe. See Foſter's Crown Law, p. 199, 200. and 1. Hawk. ch. 17. ſ. 32. Carth. 405. 4. Bl. Com. 80.

Challercomb's Caſe. CASE 22.

HENRY CHALLERCOMB was alſo indicted of treaſon for words, and was found guilty, and executed. Challercomb's Caſe. *Vide poſt.* 332.

The

Case 23.

The Case of John Williams.

Williams's Case. 3. Inst. 14. 2. Roll. Rep. 89. 1. Hale, 118, 119.

JOHN WILLIAMS was also indicted, found guilty, and executed, for writing a treasonable book, called BALAAM's Ass.

UPON consideration of all which precedents, and of the statutes of treason, it was resolved by ALL THE JUDGES before-named, and so certified to his majesty, that the speaking of the words beforementioned, though they were as wicked as might be, were not treason.

Treason must be by some particular statute; and an indictment must charge the offence in the very words of the statute.

3. Inst. 5. 22. 1. *Mar.* cap. 1. 4. Bl. Com. 80.

FOR THEY RESOLVED, that unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute 25. *Edw.* 3. c. 2. for imagining the death of the king, &c. and the indictment must be framed upon one of the points in that statute: and the words spoken here can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.

To charge the king with a personal vice, as to say of him, "That "he is the greatest whoremonger or drunkard in the kingdom," is no treason; as YELVERTON said it was held by the Judges, upon debate of *Peacham's Case*.

Michaelmas

Michaelmas Term,

4. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Memorandum.

CASE 1.

IN this vacation, *viz.* upon the eleventh day of *September*, *anno domini* 1628, SIR JOHN DODERIDGE, one of the juſtices of the king's bench, died at his houſe in *Egham*, in the county of *Surrey*; a man of great knowledge, as well in the common law as in other humane ſciences, and divinity.

The death of DODERIDGE, and the *tranſlation* of CROKE from the common pleas to the king's bench. Ante, 4. Co. Pref. 4.

After whoſe death, becauſe there were five judges in the common pleas, whereof myſelf was the fourth, whereas uſually there were but four in the ſaid court, and as many in the king's bench, the king, intending to reduce thoſe courts to their uſual courſe, upon the three-and-twentieth day of the ſaid *September* (having had communication with COVENTRY, *Lord Keeper* of the great ſeal), nominated me to be one of the juſtices of the king's bench, and ſigned a warrant the ſame day for my patent to be juſtice there; and another warrant reciting my firſt patent of juſtice of the common pleas, and determining his pleaſure concerning that place (ſaving all wages and ſums, &c. And the patent of juſtice of the king's bench was ſealed upon the ninth day of *October*, and bare date the ſame day; and the patent of revocation of my place of juſtice of the common pleas was ſealed upon the tenth day of *October*, and both patents were delivered to me upon the eleventh day of that month, at ſuch time as I was ſworn juſtice of the king's bench.

If a juſtice of the *common pleas* be made a juſtice of the *king's bench*, the office of juſtice of the common pleas becomes void on ſigning the patent of promotion, without any patent of revocation. Poſt. 600. Jones, 192. 1. *Hen.* 7. pl. 10. 4. Inſt. 100. 310. Dyer, 159. 197. 332. in marg. 1. Sid. 305.

And a queſtion was then moved about my antiquity, I having one juſtice in the common pleas, *viz.* JUSTICE YELVERTON, and two of the barons in the exchequer, *viz.* TREVOR and VERNON, my *puiſnes*, and had not a clauſe of ſaving ſuperiority, precedency, and antiquity, as was in the ſecond patent of JUSTICE NICHOLS (he being firſt one of the judges in the common pleas; and having a patent to diſcharge him from that place, was then made the prince's chancellor, and two days after juſtice of the king's bench, with an expreſs exception and allowance to be chancellor to the prince, and ſaving his precedency and ſeniority). But ALL THE JUSTICES, aſſembled at the Lord Keeper's houſe, agreed, that I needed not ſuch a ſaving; for my patent continued until the time I was judge of the king's bench, and I never ceaſed to be a judge, but was tranſlated only: and the juſtices conceived the patent of revocation of my juſtice place in the common pleas was needleſs, becauſe, by

A judge who is *tranſlated* from one court to another, without being *diſcharged* from his former office, does not loſe his *ſeniority*, although there is no *ſaving clauſe* in the patent. Dyer, 259.

MEMORANDUM.

by making me juſtice in the king's bench, my former patent was in law determined (*a*), according to the caſe *Dyer*, 159; yet, for better ſecurity, there was one made according to the precedent of JUSTICE JONES's patent, when he was removed out of the common pleas to be judge in the king's bench.

(*a*) By the grant of an office to one who holds an office incompatible with it, the *firſt office* is void. 4. Inſt. 100. 310. Dyer, 197. 1. Sid. 305. Jones, 295. *Vide poſt.* 138. 600. 1. Sid. 338. 1. Hen. 7. pl: 10. Cro. Eliz. 76. and ſee the caſe of Milward *v.* Thatcher, 2. Term Rep. 81.

CASE 2.

How a priſoner in the cuſtody of the marſhal of K. B. on an execution out of ſheriff's court, ſhall be diſcharged.

Cuſack's Caſe.

CUSACK was condemned in the ſheriff's court in *London* for debt, and taken in execution: afterwards, by a *habeas corpus*, upon ſuit in the king's bench, the ſaid execution with other cauſes were returned; whereupon he was committed to the marſhal in execution for that debt, and other his executions in the king's bench. And now all the executions in the king's bench were diſcharged; and the judgment in *London* reverſed, by a writ of error in THE HUSTINGS.

The queſtion was, How he ſhould be diſcharged of this execution? for this Court hath no record of the execution, but by the return of the *habeas corpus*: and of the reverſal of that judgment they have not any record, but what is only ſurmiſed; and they may not award a *certiorari* to *London*, for they there will not return it (*a*).

(*a*) *Sed vide* Raym. 74. 3. Mod. 230. 6. Mod. 246. Hard. 402. 1. Keb. 252. 1. Sid. 155. 230. 1. Burr. 386.

WHEREUPON it was adviſed, that all matters here concerning that execution being diſcharged, he might be remitted to *London* for that cauſe, and there be diſcharged. *Vide* 29. *Edw.* 3. *pl.* 47. 48. *Edw.* 3. *pl.* 22. 39. *Hen.* 6. *pl.* 44. & 45. *Dyer*, 152. 187.

1. Bl. Rep. 230. 4. Com. Dig. 197. 2. Hawk. P. C. 407.

CASE 3.

The words, "PROVIDED, "*and* it is "agreed, &c." make a *condition*, and not a *covenant*.

1. Roll. Abr. 410. 518. Co. Lit. 203. b. Cro. Eliz. 242. 385. 10. Co 42. 2. Co. 71. Dyer, 311. 1. Vent. 200. 2. Com. Dig. 438. Stra. 563. Cowp. 600. Dougl. 27. 766.

Geery *againſt* Reaſon.

COVENANT, The plaintiff declares, That by articles indented, ſhewn, &c. *in anno domini* 1624, he demiſed to the defendant certain rooms in *Bear-Alley* until *Midſummer* 1626, rendering the ſum of 6l. 13s. 4d. rent, "PROVIDED, and upon condition, "that the ſaid *Reaſon* ſhall gather the rents of other the plaintiff's "tenements in *Bear-Alley*, reſerved quarterly and mentioned in a "ſchedule, and pay the ſame within twenty days after every quar-"ter-day: and it is agreed, that the ſaid *Reaſon* ſhall retain the reſt "of the benefit to be made of the ſaid rooms, over and above the "ſaid ſix pounds thirteen ſhillings and fourpence *per annum*, for his "pains in gathering up the ſaid rents:" and ſhews, that the rents were mentioned in the ſchedule, and amounted to 190l. *per annum*; and that the defendant had not paid the ſaid rents: but he did not ſhew that the defendant had gathered them.

The defendant thereupon demurred: for it ſeemeth that here is not any covenant to gather or pay the rents, but a forfeiture of his leaſe if he do not gather, and pay them being gathered; and if he doth not pay them, being gathered, an account lies.

GERMINE,

GERMINE, *for the plaintiff*, insisted much, that these words, *Provided, &c.* in the indenture shall make a covenant. GERMINE *against* REASON.

BUT ALL THE JUSTICES conceived it is not *a covenant*, but merely *a condition* annexed to the estate, which determines it by not collecting and paying the rent; and it is not to be intended that it should be a covenant to inforce him to gather and pay them where peradventure he cannot collect them: and thereupon, without argument, it was adjudged for the defendant.

Chamberlaine *against* Turner. CASE 4.

EJECTMENT for an house called THE WHITE SWAN, in *Old-street*, in *London*.

A special verdict was found, That *Henry Metcalf* was seised in fee of the said house, and of a garden thereto appertaining, and held it in socage, and made his will in this manner, which is found *verbatim*: "I devise all my fee-simple lands, goods, and tenements, "to *Henry Metcalf*, my son, and the heirs males of his body, and "for default of such issue, remainder to his right heirs;" and made him executor, and appointed that he should pay his debts out of his goods and lands. And "I devise the house or tene-"ment wherein *William Nicholls* dwelleth, called THE WHITE "SWAN, in *Old-street*, to *Henry Gallant*, my daughter's son, for "ever." And the jury found, that the said *William Nicholls*, at the time of the said will making, and of the testator's death, inhabited and occupied the entry or alley of the said house, and three upper rooms therein; and that divers other persons at the same time held and occupied the garden and other places in the said house; and that *William Heylock* and his wife held another room; and that *Henry Gallant*, claiming that house, entered, and made a lease thereof to the plaintiff; and the defendant, by the command of the said *Metcalf*, heir of the devisor, *ousted* him. *Et si super totam materiam, &c.*

A devise of a particular house *for ever* passes a fee simple by force of the words of *perpetuity*, notwithstanding the testator had before devised all his fee-simple lands and tenements. Post. 200. S. C. Jones, 195. Co. Lit. 9. Cro. Eliz. 330. Cro. Jac. 21. 2. Burr. 1093. Cowp. 43. 235. 306. 660. Dougl. 266. 763. 1. Term Rep. 411. 2. Term Rep. 656.

This case being argued at the bar by BANES and CALTHROP *for the defendant*, and by ANDREWS *for the plaintiff*, two questions were moved: FIRST, Whether the heir of *Gallant* had any more than an estate for life by this devise? because all his fee-simple lands being before devised to his son and heirs males, he afterwards devised that house to *Henry Gallant* for ever; and if it be but an estate for life extracted out of the first estate, then it is determined: and he relied upon *Alice Lundham's Case*, *Dyer*, 357.

BUT ALL THE COURT resolved, that it is a fee-simple, because of the words "*in perpetuum*," or "*for ever*;" and it is not like the Case of *Alice Lundham*, where an express fee was given to one, and after his death devised to another for life.

THE SECOND QUESTION was, Whether all the house passed, or the entry and those three rooms which were in the possession of the said *William Nicholls* only?

If a man devise all his messuage in which such a person dwells, called "*The White Swan*," the whole messuage passes, though that person had only three rooms; for the name of *The Swan* ascertains the whole.—Post. 447. 473. Salk. 234. 2. Bac. Abr. 55. Jones, 379. 1. Roll. Abr. 613. Cro. Eliz. 213. 474. 4. Mod. 138. 1. And. 188. 2. Term Rep. 438. 502.

HYDE, *Chief Justice*, doubted thereof; for it may be intended that he did not devise more than *Nicholls* occupied. But JONES,

WHITLOCK,

CHAMBERLAINE *againſt* TURNER.

Cro. Jac. 649. 1. Vezey, 437. 3. Com. Dig. 22. Salk. 234. Gilb. Dev. 24. Dougl. 762.

WHITLOCK, and MYSELF, were of opinion, that all the houſe paſſed to the deviſee; for the deviſe being "that houſe or tene-"ment," and the concluſion "called THE WHITE SWAN," doth both of them neceſſarily import the whole houſe; for the ſign of THE WHITE SWAN cannot be intended to refer to three rooms; and the words after, *viz.* "wherein *William Nicholls* dwelleth," doth not abridge or alter that deviſe; and the houſe being named by the particular name of THE WHITE SWAN, although *William Nicholls* never inhabited therein, yet it paſſeth by the deviſe, and is good, becauſe he inhabited therein, although he occupied but three rooms of it: but if the houſe had not been named by the particular name of THE WHITE SWAN, and he had deviſed "THE "HOUSE in the occupation of *William Nicholls*," there peradventure it ſhould not extend to more than what was in the occupation of *William Nicholls*, and not to that which was in the occupation of others; according to the Caſe of *Andrew Ognell* (*a*), and the Caſe of *Hunt v. Singleton* (*b*), where a leaſe was made to one *Cales* of an houſe, and he let out of that two chambers, and after ſurrenders the leaſe, and a new leaſe was made to the ſaid *Cales* of the houſe in his occupation, it was adjudged only of the houſe in his occupation, and not of the two chambers, for there was a good leaſe of the houſe, although the two chambers were not deviſed: but the deviſe being "of the houſe called THE WHITE SWAN, "wherein *Nicholls* inhabiteth," cannot be intended that the deviſe ſhall be of the three chambers only, becauſe it cannot be termed the houſe called THE WHITE SWAN.

On a ſpecial verdict finding a deviſe of "all "my fee ſimple "to *A.* and of "my houſe "called the "White Swan "to *B.* for ever," it ſhall be *intended* that the teſtator had other lands than thoſe belonging to the White Swan to ſatisfy the firſt deviſe.—Moor, 268. 5. Co. 97. Yelv. 61. 2. Roll. Abr. 698. 702. Cro. Jac. 64. Cro. Eliz. 438. Eq. Caſ. 256. 1. Salk. 249. Jones, 393. 5. Bac. Ab. 299.

THE THIRD QUESTION. And whereas it was objected, That it is not found that *Henry Metcalf* had other lands in fee-ſimple to ſupply the firſt deviſe, and therefore neceſſarily it ought to be extended to the reſidue of that houſe, and then it paſſeth not all: THE JUSTICES anſwered thereunto, that it ought to be intended, although it be not expreſſed, that he had other lands, and the doubt of the jury was, Whether the intire houſe paſſed by thoſe words? So if they be ſatisfied, the Court ſhall not doubt of more than what the jury have found.—*Et adjournatur*; and afterwards it was adjudged accordingly.

(*a*) 4. Co. 48. 50. (*b*) Cro. Eliz. 473. 564. 3. Co. 60. a.

CASE 5.

Inkerſalls *againſt* Samms.

In *aſſumpſit* the day upon which the promiſe is laid in the declaration is not material; and if the jury find a general verdict according to the iſſue, and a ſpecial matter againſt it, the ſpecial matter is void.—Ante, 76. Poſt. 174. 212. Jones, 192. Cro. Jac. 55. Cro. Eliz. 481. 683. 1. Term Rep. 141. 3. Leon. 80. Hob. 53. Stra. 806. 5. Com. Dig. 168. 171. Cowp. 826. Dougl.

ASSUMPSIT againſt the defendant as executor. Whereas the teſtator in his life, *viz.* upon the 16. *October*, 18. *Jac.* 1. in conſideration of five pounds lent unto him, promiſed to pay, &c. the defendant pleads, that the teſtator *non aſſumpſit*. The jury find, that the teſtator *aſſumpſit modo et formâ*, but that the teſtator died ſuch a day, *viz.* in 17. *Jac.* 1. ſo that he was dead a year and more before the time which is alledged in the record.—And at the firſt argument THE COURT held for the plaintiff, that the verdict being that the teſtator *aſſumpſit modo et formâ*, the finding over

that

that the teſtator died before the time mentioned in the declaration is idle, ſuperfluous, and not material; nor is the day of the *aſſumpſit* material; and although he were dead before the day mentioned in the declaration, it is good enough. And thereupon it was adjudged for the plaintiff. *Vide* 23. *Eliz. Dyer*, 372. 2. *Co.* 4. *Goddard's Caſe.* INKERSALL *againſt* SAMMS.

Halloway's Caſe. CASE 6.

A boy treſpaſſed into a park with intent to ſteal wood, but, on perceiving the park-keeper, climbed up a tree to hide himſelf: on his coming down, the parker ſtruck him twice with a cudgel, and then bound him to his horſe's tail, and dragged him till his ſhoulder was broke, whereof he died: this was adjudged MURDER; for the correction was exceſſive, and an act of deliberate cruelty.

W. Jones, 198. Kely. 127. Crompt. 136. Dalton, 245. 1. Hale P. C. 454. Palm. 545. Foſter, 292. 1. Hawk. P. C. 126. 3. Bac. Abr. 668. Cowp. 830.

HALLOWAY was indicted and arraigned at *Newgate* for murdering one *Payne*. The indictment was, That he, *ex malitiâ ſuâ præcogitatâ*, tied the ſaid *Payne* at a horſe's tail, and ſtruck him two ſtrokes with a cudgel being tied to the ſaid horſe, whereupon the horſe ran away with him, and drew him upon the ground three furlongs, and thereby brake his ſhoulder, whereof he inſtantly died, and ſo murdered him.

Upon this indictment he being arraigned pleaded not guilty; and thereupon a ſpecial verdict found, That *the earl of Denbigh* was poſſeſſed of a park called *Auſterly Park*, and that the ſaid *Halloway* was woodward of his woods in the ſaid park; and that the ſaid *Payne*, with others unknown, entered the ſaid park to cut wood there, and that the ſaid *Payne* climbed up a tree, and with an hatchet cut down ſome boughs thereof; and that the ſaid *Halloway* came riding into the park, and ſeeing the ſaid *Payne* on the tree commanded him to deſcend, and he deſcending from thence the ſaid *Halloway* ſtruck him two blows upon the back with his cudgel; and the ſaid *Payne* having a rope tied about his middle, and one end of the rope hanging down, the ſaid *Halloway* tied the end of that rope to his horſe's tail, and ſtruck the ſaid *Payne* two blows upon his back; whereupon the ſaid *Payne* being tied to the horſe's tail, and the horſe running away with him, drew him upon the ground three furlongs, and by this means brake his ſhoulder, whereof he inſtantly died, and the ſaid *Halloway* caſt him over the pales into certain buſhes. And, Whether upon all this matter found the ſaid *Halloway* be guilty of the murder, *prout?* they pray the diſcretion of the Court; and if the Court ſhall adjudge him guilty of the murder, they find him guilty of the murder; if otherwiſe, they find him guilty of manſlaughter.

This ſpecial verdict was removed by *certiorari* into the king's bench, and depended three Terms; and the opinion of all THE JUDGES AND BARONS was demanded, and they all (except HUTTON, who doubted thereof) held clearly that it was murder: for when the boy, who was cutting on the tree, came down from thence upon his command, and made no reſiſtance, and he then ſtruck him two blows, and tied him to the horſe's tail, and then ſtruck him again, whereupon the horſe ran away, and he by that means was ſlain, the law implies malice; and it ſhall be ſaid in law to be prepenſed malice, he doing it to one who made no reſiſtance. And ſo this Term all the Juſtices delivered the reaſon of their opinions: whereupon judgment was given, and he was adjudged to be hanged, and was hanged accordingly.

Juxon

Case 7.

Juxon *againſt* Thornhill.

Trinity Term, 4. Car. 1. Roll 76.

A person may, by the king's licence, raise locks upon a publick navigable river flowing through his own land, for the advantage of the navigation; and the owners of barges passing through them may be obliged to pay such toll as the privy council shall afterwards appoint. Post. 184, 185. 1. Roll. Abr. 464. Carth. 191. Cowp. 47. 3. Term Rep. 253.

ASSUMPSIT. Whereas the plaintiff, by the king's licence, had erected in *Godmanchester*, and in five other places in his own land, six several sluices or locks upon the *river Ouse*, for the better raising and heightening the water in the river, for the easier passage of boats through the said locks; and the king had granted to him to take such reasonable sums for the passage through the said locks as should be agreed upon betwixt him and those who should have such passage: and for that there was contention betwixt him and the defendant and divers others what sums should be paid for such passage, a petition was thereupon presented to the lords of the council, and by them referred to THE EARL OF MANCHESTER, *Lord President*, to set down what rates those which passed through the said locks should pay: that the defendant, in consideration the plaintiff would permit him to pass through the said locks, upon the 20. *Oct.* 3. *Car.* 1. promised to the plaintiff, that he would pay him such sums as the said lord president should appoint: and alledgeth in fact, that between the said 20th of *October* and the 23d of *April* following he passed through the said locks with his boats, and carried 2120 tons of coal: and that upon the 24th of *April* the said *earl of Manchester* set down and ordered, that two-pence halfpenny should be paid for every ton which passed through the said locks, in every lock two-pence halfpenny; and that for the said 2120 tons, according to the said rate, the defendant ought to pay him eleven pounds: and that upon the 29th of *April* then next following he requested the defendant to pay the said eleven pounds, and he refused to pay it, whereupon he brought this action.

The defendant pleaded *non assumpsit*; and it was found against him; and now moved in arrest of judgment,

FIRST, That it is no good consideration; because the *river Ouse* is a common river, and it is not lawful for any to make stops upon the river, or to take sums of money for the passage through the locks —*Sed non allocatur*; for the locks are upon the plaintiff's own land, and at his cost, for the exaltation of the water, and making the river navigable for vessels of burthen; and it stands with good reason that they should pay for their passage according to their agreement.

In *assumpsit* on a promise to pay so much for passing through certain locks on a navigable river as *A.* should appoint, it is not necessary to give the defendant notice of the sums *A.* appoints to be paid. Ante, 95. Post. 2. Vent. 204.

SECONDLY, Because it is not shewn that the defendant had any notice given him of the *earl of Manchester*'s order.—*Sed non allocatur*; because he ought to pay as much as he should appoint, and the defendant is to take notice of his order as well as the plaintiff, he being a stranger to both; as where one is obliged to perform an arbitrament, there needs not any notice to be given unto him, but he ought to take notice at his peril. Also the plaintiff alledgeth, that he required the sum according to the order, which is an implied notice. Whereupon rule was given, that judgment should be for the plaintiff, unless farther matter should be shewn to the contrary by such a day.

392. 577. S. C. 1. Roll. Abr. 464. Cro. Jac. 288. 492. 5. Co. 113. 6. Mod. 87. 2. Lev. 22. 2. Bulst. 144. Kyd on Awards, 73.

Chambers's

Chambers's Caſe.

CASE 8.

CHAMBERS, being in priſon in the *marſhalſea del hoſtel de roy*, deſired a *habeas corpus*, and had it; which being returnable upon the fifteenth day of *October*, the marſhal returned that he was committed to priſon the twenty-eighth day of *September* laſt by the command of the lords of the council. The warrant *verbatim* was, That he was "committed for inſolent behaviour and *words* ſpoken "at the council table;" which was ſubſcribed by the lord keeper and twelve others of the council.—And becauſe it was not mentioned what the *words* were, ſo as the Court might adjudge of them, the return was held inſufficient, and the marſhal adviſed to amend his return before the twenty-firſt of *October* following.

A priſoner committed to the king's bench priſon, and brought up by *hab. cor.* may be remanded and brought up again without a *new hab. cor.* by RULE or ORDER of the Court; and if the commitment be by the privy council "for words" ſpoken at their board, without ſpecifying what the words were, he ſhall be bailed. Poſt. 507. 579. 593.

And he was, by rule of the Court, appointed to bring his priſoner then, without a new *habeas corpus*; and the priſoner was adviſed, that in the mean time he ſhould ſubmit to the lords, and petition them for his enlargement. Upon the ſaid 21ſt of *October* the marſhal had his priſoner there; but becauſe the great Caſe of *Sir William Withipole* (*a*) was to be debated that day, and time would not permit to treat of this matter, the marſhal was commanded to bring again his priſoner, and have him in court the 23d day of *October*.

GERMINE, *for the priſoner*, then moved, that foraſmuch as it appeared by the return, that he was not committed for *treaſon* or *felony*, nor doth it appear what the *words* were, whereto he might give anſwer, he therefore prayed he might be diſmiſſed or bailed.

Cro. Jac. 81. 2. Inſt. 55. Vaugh. 137. Moor, 839. Jones, 15. 2. Leon. 175. 3. Leon. 194. 4. Leon. 21. 5. Mod. 85. 1. Salk. 347. 2. Vent. 23. Stra 404. Fitzg. 266. Fort. 272. 3. Com. Dig. 458. 2. Hawk. P. C. 166. 170. 185.

But THE KING'S ATTORNEY moved, that he might have day until the 25th of *October* to conſider of the return, and be informed of the words, and that in the interim the priſoner might attend the council-table and petition.

But the priſoner affirmed, that he oftentimes had aſſayed by petition, and could not prevail, although he had not done it ſince the beginning of *October*; and he prayed the juſtice of the law and the inheritance of a ſubject.

Whereupon, at his importunity, THE COURT commanded him to be bailed; and he was bound in a recognizance of four hundred pounds, and four good merchants his ſuretics were bound in recognizances of one hundred pounds a-piece, that he ſhould appear here *in Craſtino Animarum*, and in the interim ſhould be of good behaviour; and advertiſed him, that they might for contemptuous words cauſe an indictment or information in this Court to be drawn againſt him, if they would (*b*).

(*b*) *Vide* poſt. 168.

(*a*) See poſt. 134. 147.

Case 9.

Sir William Withipole's Case.

A person arraigned for murder may plead the 11. *Hen.* 4. c. 9. in avoidance of the coroner's inquisition or the indictment; and then plead over to the felony.—Persons outlawed in personal actions cannot be jurors. Post. 147. 365. Ley, 81. Jones, 198. 3. Inst. 34. Sum. 202. Bro. Ind. 2. 11. *Hen.* 4. 41. S. P. C. 88. 2. Hale, 60. 155. 2. Hawk. P. C. c. 25. s. 24. to 32. 3. Bac. Abr. 233. 254.

SIR WILLIAM WITHIPOLE, being indicted before the coroners for the murder of *Madyson*, and being arraigned upon that inquest, informed the Court, that he had matter in law to plead to avoid the indictment, and that he ought not to be put to answer; and prayed that counsel might be assigned him.

MR. NOY and others were assigned; who, at another day, put in a plea for him, that he ought not to be impeached upon this indictment; for he shewed in his plea the statute of 11. *Hen.* 4. c. 9. "That none shall be put upon any pannel of inquest at the denomination of any person, unless by the bailiffs and ministers of "the sheriffs sworn and known; and that the said jurors should "be *probi et legales homines*:" and further pleads, that *Alston*, the foreman of the jury, nominated himself to be of the jury, and fourteen others (shewing their names); and one *Alexander Farrington* required him to return them, he not being sheriff, nor bailiff of the franchise, nor any minister of any sheriff, nor bailiff of any franchise, who ought by the law to return them; and by the said jury the said inquisition was found. And he further pleaded, that two of the said jurors were *outlawed* in actions of debt, the one in the twelfth year of KING JAMES, the other in the first year of KING CHARLES, and produced the records, being sent by *mittimus* out of the chancery; and averred that the outlawries are yet in force, not reversed nor vacated.

And upon this plea pleaded the Court would advise, Whether it should be accepted? and, What should be done thereupon, either demur or join issue?

THE FIRST QUESTION was, Whether the 11. *Hen.* 4. c. 9. extends to inquests before coroners, or only to indictments before justices of the peace and of *oyer* and *terminer*?

SECONDLY, Admitting that this statute extends thereunto, Whether it extends to persons outlawed in personal actions, or only to persons outlawed for *felony* or *treason* (a)?

(a) Post. 147. Co. Lit. 158. 307. 312. 587.

21. *Hen.* 6. *pl.* 30. 11. *Hen.* 4. *pl.* 41. 2. Roll Abr. 657. 3. Inst. 32. 2. Hawk. P. C.

And because this was the first plea that had been upon that statute, and would be a precedent in crown matters, the Court would advise. And all the justices of both benches, and barons of the exchequer, met thereupon at *Serjeants-inn* in *Fleet-street*; and having had conference of these points, the greater part of the said JUSTICES AND BARONS were of opinion,

FIRST, That the 11. *Hen.* 4. c. 9. extends as well to inquests before the coroners, as to indictments before justices of peace.

SECONDLY, That it extends to persons outlawed in personal actions, because an outlawed person is not accounted *probus et legalis homo* to be sworn in an inquest, and may be challenged for that cause. *Vide* 34. *Edw.* 1. "*Proces*" 208. 21. *Hen.* 6. *pl.* 30.

But

But divers others of THE JUSTICES AND BARONS were of the contrary opinion (*a*).

(*a*) Jones, 199, ſays, that three only were of a contrary opinion.

FIRST, Becauſe the 11. *Hen.* 4. c. 9. begins with inqueſts before the juſtices, and ſo the act ſeems to extend to them; and the ſtatute mentions denomination to the ſheriff or bailiff of the franchiſe; and the inquiſition before the coroners is to be of perſons within the four next adjacent villages, to be made by the bailiffs or conſtables of thoſe villages, as appeareth by the 4. *Edw.* I. ſt. 2. *de officio coronatoris*, and *Crompton*, *folio* 113. that no challenge ſhall be to any of the inqueſt before the coroners (*b*).

(*b*) He was arraigned on the indictment on the firſt day of Hilary Term. Poſt. 147.

William Viſcount Say and Seal *againſt* Stephens.

CASE 20.

Trinity Term, 4. *Car.* I. *Roll* 602.

ACTION OF SCANDALIS MAGNATUM. The plaintiff declares by the name of WILLIAM *Viſcount* SAY AND SEAL, *unus procerum et magnatum hujus regni* ANGLIÆ, *tam pro domino rege quàm pro ſeipſo, queritur* of the defendant *in cuſtodiâ mareſchalli pro eo*, Whereas by the ſtatute 2. *Rich.* 2. c. 5. confirmed by ſtatute 12. *Rich.* 2. c. 11. it was ordained, &c. reciting the ſtatute; the defendant, not regarding nor reſpecting the ſtatute aforeſaid, on the firſt day of *February*, in the third year of *Car.* I. at the pariſh of *Bow*, in the ward of *Cheap*, *London*, having communication with *Alice Gilbert*, a ſervant of the ſaid WILLIAM *Viſcount* SAY AND SEAL, of him the ſaid *Viſcount*, in the preſence and hearing of divers of the king's ſubjects then and there being, *hæc falſa et ſcandaloſa verba de eodem vicecomite* SAY AND SEAL *dixit et publicavit*, viz. "Thy lord," *dictum comitem* INNUENDO, "is a traitor, and "I will prove him," *prædictum comitem* INNUENDO, "a traitor."

In an action of SCAN. MAG. the ſtatute need not be recited at large.—"*Debates*," inſtead of "*Slander*," or "*diſcordia inter magnatet et communitatem*," inſtead of "*diſcordia hoc regnum*," are not material variances; but if the ſtatute be miſ-recited in a *ſubſtantial part*, it is fatal. Poſt. 232.

The defendant pleaded *not guilty*; and it was found againſt him, and damages aſſeſſed to two thouſand pounds.

Ley, 82. Jones, 194. Cro. Eliz. 906. 1. Roll. Rep. 78. Palmer, 565. Buller's N. P. 4. 4. Co. 12. b. 2. Inſt. 225. 4. Inſt. 52. 1. Lev. 277. 1. Sid. 233. 434. 1. Mod. 232. 2. Mod. 99. 150. 152. 159. 166. 2. Hawk. P. C. 349, 350. 352.

CRAWLEY, *Serjeant*, and MR. CALTHROP, now moved in arreſt of judgment, FIRST, That this ſtatute is miſ-recited; and then he, founding his ſuit for himſelf and the king, and there being no ſuch ſtatute, hath failed. In proof thereof they relied upon the Caſe of *Lord Cromwell* (*a*), where an action was brought upon this ſtatute and miſ-recited, viz. "*nuncia*" for "*mendacia*;" there the plaintiff might not have judgment: and *Partridge v. Strange* (*b*), where an action was founded upon the 32. *Hen.* 8. c. 9. of maintenance, and *the date* of the ſtatute was miſtaken, and there the plaintiff might not have judgment; for the Court would not intend any other ſtatute than that whereupon he counts and hath miſtaken, and being upon that the Court will not adjudge for him. And in the preſent Caſe he recites the ſtatute to be, "that none ſhall re-"port or publiſh *de magnatibus aliqua nova mendacia, ſeu alias res*, "*unde diſcordia aut aliqua lis* (ANGLICÈ debates) *inter magnates vel* "*inter magnates et communitatem dicti regni oriri poſſint*," whereas the ſtatute is, "whereof diſcord or ſlander may ariſe within the ſaid "realm;" ſo as there is a miſ-recital and variance betwixt the

(*a*) 4. Co. 12. (*b*) Plowd. 82.

WILLIAM Viſcount SAY AND SEAL *againſt* STEPHENS.

words: "*debates*" for "*ſlander*," which is a variant word; and the words "within the ſaid realm" vary from the words "*inter* "*magnates et communitatem hujus regni.*"

SECONDLY, Becauſe it is not ſhewn that he was *unus magnatum* at the time of the ſpeaking of the words, as the precedent is in *Lord Cromwell's Caſe*; for it may be that he was created *viſcount* or *baron* after the ſpeaking of the words, and it ſhall not be intended that he was a *viſcount* before, unleſs it had been averred that he was then a *viſcount*.

4. Co. 12. Palm. 565. 2. Mod. 98. Ld. Raym. 382. Cro. Jac. 362. 1. Com. Dig. 174. Dougl. 97. 1. Term Rep. 235. to 240.

But THE COURT reſolved in both points for the plaintiff; for they all agreed, if the miſ-recital or variance had been in the purview or ſubſtantial part of the act, as miſ-reciting the time of the making, as in *Partridge's Caſe*, or in the body of the act, as in *Lord Cromwell's Caſe*, "*nuncia*" PRO "*mendacia*," which is another word and of another ſenſe, and in the body of the act, ſuch variance had been good cauſe to ſtay the judgment: but here, they conceived, there is not any material variance, for the firſt part of the act is "*debate vel diſcordia*," and in the laſt part "*diſcordia vel* "*diſlander*," which in the intention of the makers of the ſtatute be all one; alſo it is in the PERCLOSE "*unde diſcordia, &c.*" which is but the conſequence of the words, or the evil effect enſuing thereupon, and falſe words and lies are principally prohibited in that ſtatute. The ſecond variance is of the ſame condition, not material in ſubſtance; wherefore for ſuch the Court ſhall not ſtay judgment.

In *ſcan. mag.* if the declaration give the plaintiff the addition of *viſcount*, it is ſufficient to ſhew, that he was *unus magnatum* when the words were ſpoken.

For THE SECOND EXCEPTION, ALL THE COURT held the declaration to be good enough; for there is ſufficient demonſtrance in the declaration that he was a viſcount at the time of the ſpeaking, for he nameth himſelf *viſcount*, and recites the ſtatute, and that the defendant, not regarding the ſtatute, ſpake thoſe words of the ſaid WILLIAM *Viſcount* SAY and SEAL: and it cannot be ſpoken againſt the ſaid WILLIAM *Viſcount*, unleſs he had been then a viſcount; and the law doth not intend that he was a viſcount of another realm, for of them our law doth not take any cognizance.

A *viſcount* is within the ſtatute, though a dignity created ſince the ſtatute. Co. Lit. 60.

IT WAS OBJECTED, That there were not any *viſcounts* in king *Richard* the ſecond's time, ſo that the ſtatute cannot extend to them. But it was anſwered, True it is, there were not then any viſcounts; for in the eighteenth year of king *Henry* the ſixth was the firſt viſcount, and in the one-and-twentieth year of the ſaid king was the queſtion for their ſeats in parliament; yet the ſtatute is, "*de* MAGNATIBUS *regni* ANGLIÆ;" and every viſcount is a baron, which is an addition of honour.

In an action of *ſcan. mag.* if the ſpeaking be alledged to have been to the ſervant of *an earl* and *of an earl*, it need not be averred that he was *an earl* at the time the words were ſpoken. Jones, 194. 1. Com. Dig. 194.

By another reaſon it appears that he was then a viſcount, for the ſpeaking is alledged to be to ſuch a ſervant of the ſaid WILLIAM *Viſcount* SAY AND SEAL, and ſhe cannot be ſervant to a viſcount unleſs he were then a viſcount: alſo the words themſelves are, "Thy lord is a traitor," which prove that he was *a lord* at the time of the ſpeaking; and when he names himſelf *viſcount* in ſo many places, to aver afterwards that he was *a viſcount* had been idle and ſuperfluous. But where a juſtice of peace or other officer brings an action for ſlanderous words ſpoken of him in his office

WILLIAM Viſcount SAY AND SEAL *againſt* STEPHENS.

or place, there of neceſſity he ought to ſhew that he was then a juſtice of peace or ſuch an officer wherein he was ſlandered; yet if he ſhew that which is *tantamount* it ſufficeth, as that he had been a juſtice of peace for divers years, or for two years, and the ſpeaking is alledged to be within the year, that is ſufficient; yet it may be that the commiſſion is renewed, but it ſhall not be intended. Whereupon judgment was given for the plaintiff (*a*),

(*a*) A writ of error to the exchequer chamber was brought on the judgment; but it was adjudged that an action of *ſcan. mag.* is not within the 27. Eliz. c. 5. *Vide* poſt. p. 142.

Baylye *againſt* Hughes.

CASE II.

Trinity Term, 4. *Car.* 1. *Roll* 738.

DEBT for forty ſhillings and ſixpence; and declares, That *Sir Henry Brown* by indenture let to *J. S.* for two hundred years, rendering thirty-one ſhillings *per annum*, at the *Annunciation* and *St. Michael* by equal portions, and conveys the reverſion to him as aſſignee: and for fifteen ſhillings ſixpence for rent behind for one year ending at the *Annunciation* laſt paſt, and for twenty-five ſhillings for money lent, he brings this action.

The aſſignee of *a term*, may take advantage of a covenant againſt the aſſignee of *the reverſion*.

S.C. Jones, 242. 3. Lev. 326. 2. Com. Dig. 562. Co. Lit. 215. a. Dougl. 764. 3. Term Rep. 393. 678.

The defendant pleaded as to the twenty-five ſhillings "*non debet*;" and as to the fifteen ſhillings ſixpence, That the ſaid *Sir Henry Brown* demiſed the ſaid lands, rendering rent *prout*, and by the ſame indenture covenants for himſelf, his heirs and *aſſigns*, with the leſſee, his executors and *aſſigns*, that if he be diſturbed for reſpite of homage, or be inforced to pay any charge or iſſues loſt, that he ſhall withhold ſo much of this rent as he ſhall be inforced to pay; and ſhews, that by a writ iſſuing out of the exchequer for reſpite of homage and iſſues loſt, ſo much was levied by the ſheriff which he hath withheld of his ſaid rent.

Upon this plea it was demurred in law,

The principal queſtion was, Whether the aſſignee of a term ſhall have remedy upon a covenant by way of retainer againſt the aſſignee of a reverſion?

SECONDLY, Becauſe the defendant doth not ſhew that the land was held *in capite*, or that homage was due, or the iſſues duly levied.

WHISTLER, *for the defendant*, after theſe matters moved at the bar, argued, that the aſſignee ſhould have the benefit of this covenant by the common law; and if not, that he was clearly within the 32. *Hen.* 8. c. 34. And for the other matter the plea is good; for if he be diſtrained or aggrieved for the homage or iſſues, he may detain his rent.

But then he took exception to the declaration, for that the plaintiff demanded fifteen ſhillings ſixpence for rent, for a year ending at the *Annunciation*, and the entire rent was one-and-thirty ſhillings; ſo that what he demanded was but rent for half a year, and he doth not ſhew that he was ſatisfied for the reſidue, and therefore the declaration ill;—which was held by THE COURT to be an incurable default. Whereupon the record being viewed, and found ſo, rule was given, that judgment ſhould be,

In debt for 15*s.* upon a leaſe rendering 30*s.* demanding rent for *a year*, it muſt be ſhewn how the 15*s.* are diſcharged. Poſt. 437. 2. Lev. 4.

Ante, 104. 436 — 20. Edw. 4. 2. Jones, 242. 2. Vent. 129. 1. Lut. 535. 3. Co. 24. Hutt. 96. 5. Com. Dig. 58. 242. (2. W. 7.) 246. 3. Term Rep. 65.

BAYLYE *againſt* HUGHES.

for the defendant, that the bill ſhould abate; and no more was ſpoken at the bar.

Peſt. 503. Shep. Touch. 173. 3. Term Rep. 393. 678.

But THE COURT conceived, that the aſſignee of the term ſhould have the benefit of this covenant, for it runs with the land; and at the common law he might have taken advantage to detain the rent reſerved upon the leaſe for years, for it may be appointed to ceaſe at the will of the parties.

CASE 12.

Crane *againſt* Holland.

Eaſter Term, 4. *Car.* 1. *Roll* 294.

Bailiffs may, by cuſtom, act both in a *judicial* and in a *miniſterial* capacity in the ſame court, and in the ſame cauſe.

ERROR of a judgment in *Northampton*, Becauſe in *Northampton* the court being held before the mayor and two bailiffs, the *venire facias* upon the iſſue was awarded to the two bailiffs to return a jury before the mayor and bailiffs *ſecundum conſuetudinem*; which being returned, and judgment given,

The error aſſigned was, Becauſe the bailiffs, being *judges* of the court, could not alſo be *officers* to whom proceſs ſhould be directed, there being no cuſtom that can maintain any to be both officer and judge.

S.C. Jones, 193. Cro. Eliz. 76. Cro. Jac. 178. 4. Com. Dig. 586. 4. Mod. 17. 66. 8. Term Rep. 81.

But ALL THE COURT (*abſente* HYDE) conceived it might be good *by cuſtom*, and that it was not any error, for the judges are not the bailiffs only, but the mayor and bailiffs; and it is a common courſe in many of the ancient corporations where the bailiffs are judges, or the mayor and they are judges, yet in reſpect of executing proceſs they are the officers alſo; and one may be judge and officer *diverſis reſpectibus*, as in re-diſſeiſin the ſheriff is judge and officer. Whereupon the judgment was affirmed.

CASE 13.

Skevill *againſt* Avery.

To treſpaſs of aſſault and battery, the defendant may juſtify that he was *poſſeſſed* of a houſe, and *manus molliter impoſuit* in defence of his *poſſeſſion*, without ſetting out his *title* ſpecially; for his title or intereſt is not in iſſue.

TRESPASS of aſſault, battery, and wounding. The defendant pleaded to the wounding, Not guilty. To the aſſault and battery he pleaded, That he was poſſeſſed of a houſe in ſuch a pariſh for years, and that the plaintiff entered his houſe, and would have thruſt him out of poſſeſſion thereof; whereupon he *molliter manus impoſuit* to put him out, and the harm, if any done, was in defence of his own poſſeſſion.

The plaintiff hereupon demurred.

2. Hen. 7. 2. 1. Jones, 453. Co. Lit. 303. Yelv. 147. 1. Cro. Jac. 86. 223. 673. Salk. 643. 562. 3. Mod. 132.

GOLDSMITH, *for the plaintiff*, ſhewed for cauſe, That the defendant had pleaded a leaſe for years, not ſhewing who made the leaſe, nor when it was made, nor for how many years; whereas they ought to have been pleaded ſpecially, and ſhewn *particulatim*, for, if it be traverſed, there cannot be any iſſue thereupon: and he relied upon *Cregat's Caſe* (*a*), that "*de injuriâ ſuâ propriâ* is no plea.

But ALL THE COURT held, that the defendant had well pleaded; for ſaying that he was poſſeſſed for years is but an inducement and conveyance to his juſtification, and not the ſubſtance thereof,

Hob. 218. 12. Mod. 37. 509. Carth. 10. 445. Comb. 27. 472. 2. Mod. 70. 5. Com. Dig. 73. 79. 355. 3. Wilſ. 65. 1. Term Rep. 671. 3. Term Rep. 643.

(*a*) 8. Co. 66.

which

which is, that he offered to thruſt him out of the poſſeſſion of his houſe; and whatſoever title he hath, it is not material, for if he were in poſſeſſion by virtue of a leaſe at will, or any other title, "*de injuriâ ſuâ propriâ*" is a good plea; for the title or intereſt not coming in queſtion (and what was pleaded or alledged being but an inducement to the plea), it needs not be ſo certain as where it is pleaded by way of title to make a claim in the defendant. Whereupon it was adjudged for the defendant.

SKEVILL *againſt* AVERY.

Ld. Raym. 132. 3. Term Rep. 643.

Shutford *againſt* Penow.

CASE 14.

Trinity Term, 4. *Car.* 1. *Roll* 770.

ASSUMPSIT. Whereas the defendant had a dog which uſed to kill ſheep, and knowing thereof, and that his dog had killed the plaintiff's ſheep, and having notice that the plaintiff intended to ſue him for recompence, he thereupon intreated the plaintiff not to ſue him, and to make what benefit he could of the ſheep ſo killed; and in conſideration that the plaintiff would deſiſt his ſuit, and make ſuch benefit as he might of the ſaid ſheep, the defendant, the firſt day of *May*, 18. *Jac.* 1. promiſed the plaintiff to recompenſe him the damages which he ſuſtained by the killing of the ſaid ſheep; and alledgeth in fact, that he thereupon deſiſted from his intended ſuit, and that he endeavoured to make what benefit he could of the ſheep ſo killed, but could not make any; and that he was damnified by the killing of them four-and-forty ſhillings; and that upon the firſt day of *May*, 2. *Car.* 1. he requeſted the defendant to recompenſe him for his damages ſuſtained, and the defendant refuſed; whereupon he brought this action.

Where a promiſe is made to do a thing upon *requeſt*, the cauſe of action does not ariſe until the *requeſt* be made and refuſed.

Ante, 35. 115. Godb. 437. Jones, 194. Hutton, 107. 1. Lev. 48. Salk. 422. Skin. 555. Strange, 907.

The defendant pleaded the 21. *Jac.* 1. c. 16. and that this action lies not by the ſaid ſtatute, being grounded upon a promiſe made above ſix years ſince; whereupon the plaintiff demurred.

And after argument at the bar by ROLLS, *for the plaintiff*, and by *for the defendant*, it was adjudged, that the action was well brought within the time limited; for although the promiſe was made 18. *Jac.* 1. yet there was not any cauſe of breach thereof, nor ground of action againſt the defendant until requeſt to make recompence; for until ſuch requeſt he did not know what to pay, nor was there any due, for the duty ariſeth upon the requeſt, and the non-payment after the requeſt is the cauſe of the action: as *aſſumpſit* to pay ſuch a ſum if he marry *A. S.* or upon ſuch perſon's return from *Rome* upon requeſt, there is not any thing due, nor is there cauſe of action, until the marriage or return from *Rome* and the requeſt made; and although the promiſe was made ten years before, yet the cauſe of action is the non-payment upon requeſt after marriage or return from *Rome*, and not before; and if the action be brought within the time of the ſtatute after the breach, it is well enough. Whereupon it was adjudged for the plaintiff.

Case 15.

Lewknor *againſt* Cruchley and his Wife.

Eaſter Term, 4. Car. 1.

To charge another with an aſſault with intent to rob is actionable, although the words import that no felony was in fact committed.

S. C. Jones, 195. 1. Roll. Ab. 50. 4. Co. 19. b. Yelv. 90. Poſt. 337. 1. Sid. 231. 373. Latch. 47. Palm. 11. 1. Com. Dig. 377.

ACTION for words ſpoken by the wife of *Cruchley*; for that the defendant ſaid of the plaintiff, "JOHN LEWKNOR" (*innuendo* the plaintiff) "and JOHN SMITH" (*innuendo* one *John Smith*), "knowing that *J. S.* a goldſmith, did carry with him a "great deal of plate, did lay wait to rob him, and ſet upon him "by the highway; but he raiſing the country, they did fly away, "and LEWKNOR loſt his horſe, and they both were driven to ride "away upon one horſe." Upon not guilty pleaded, the verdict was found for the plaintiff.

GARDINER moved in arreſt of judgment, that an action lies not for theſe words, for it appears by his own ſhewing that there was not any felony committed; and ſhe doth not charge him with felony, but with a miſdemeanor (*a*), as it were a riot, and is no more than if ſhe had charged him with committing a riot; and it is but with an intent to do it; and therefore for theſe words an action lies not. In the Caſe of *Eaton v. Allen* (*b*), for ſaying, "He is a "brabbler and quarreller, for he gave his champion counſel to "make a deed of gift of his goods to kill me, and then to fly out "of the country, but God preſerved me," it was adjudged that the action lies not, for he did not do any act, but it is matter of intent which cannot be known.

But ALL THE COURT delivered their opinions *ſeriatim*, that the action well lies; for although he chargeth him with an act which is not felony, yet he chargeth him not only with the intention but with a fact which is as near to felony as may be, and is ſuch an offence which is more than intent only and more than riot, and for which fine and impriſonment are due.

JONES, *Juſtice*, cited one *Wicks's Caſe*, where the defendant ſaid, "Nine perſons ſet upon me to have robbed me, and *you*," *innuendo* the plaintiff *Wicks*, "was one of them," and adjudged that the action well lay. Whereupon judgment was given for the plaintiff.

(*a*) But now by 7. Geo. 1. c. 22. this offence is made felony.
(*b*) 4. Co. 16.

Case 16.

Law *againſt* Harwood.

Michaelmas Term, 3. Car. 1. Roll 336.

In an action for the ſlander of title, a ſpecial damage muſt be ſhewn.

Ley, 89. Jones, 196. Cro. Jac. 398. 484. Cro. Eliz. 197. 1. Roll. Rep. 244. Yelv. 89. Moor, 187. 1. Sid. 85. 95.

ERROR of a judgment in *Windſor*, in an action on the caſe for ſlander of title. The plaintiff declares, Whereas he was ſeiſed in fee as copyholder of lands in *D.* within the juriſdiction of the defendant's court, that the defendant ſaid, "he had not any title to "thoſe lands."

The defendant juſtifies; and iſſue being taken thereupon, it was found againſt the defendant, and damages aſſeſſed to ten ſhillings, and ſixpence coſts; and the court increaſed the coſts to three pounds, and judgment given accordingly.

THE FIRST ERROR aſſigned was, That the declaration was not good, becauſe he did not ſhew that by the occaſion of thoſe

Palmer, 530. Raym. 61. 1. Com. Dig. 175. 5. Com. Dig. 534.

words

words he had any prejudice, as that he was bargaining for the inheritance with any, or for a leaſe, or any other ſpecial prejudice. Law *againſt* Harwood.

THE SECOND ERROR was, Becauſe damages being found but at ten ſhillings, he might not, by the 21. *Jac.* 1. c. 16. have more coſts than damages.

ALL THE COURT agreed as to the firſt error aſſigned, that the declaration was not good, and ſo the judgment was erroneous, becauſe the action is not maintainable without ſhewing ſpecial prejudice, no more than for calling one "whore" or "baſtard" without ſhewing ſpecial cauſe of temporal damages; as in *Anne Davies's Caſe* (*a*). And it is not like to words ſpoken which imply ſlander and temporal loſs, as "thief," and "bankrupt," or ſuch like; but ſlandering of one's title doth not import in itſelf loſs, without ſhewing particularly the cauſe of loſs by reaſon of the ſpeaking the words, as that he could not ſell or let the ſaid lands; but being general words they are not ſufficient. 1. Co. 177.

TO THE SECOND ERROR aſſigned, all except HYDE, who ſeemed to doubt thereof, held, that the action is out of the ſtatute of 21. *Jac.* 1. c. 16. as well for the time of limitation as for the coſts, for that extends to actions for ſlanderous words which are intended to the perſons of men, and are common actions, and rather begin of ſpleen than otherwiſe; but not to this action, which is rare, and not brought without ſpecial damage. But for the firſt cauſe the judgment was reverſed. An action for ſlander of title is not within 21. *Jac.* 1. c. 16. which gives no more coſts than damages if under 40s. Poſt. 163. 1. Sid. 95.

Jones, 196. 1. Salk. 207. 2. Mod. 371. 3. Mod. 311. Stra. 645. 2. Com. Dig. 546. 5. Com. Dig. 533. R. 453. 1. Term Rep. 655.

(*a*) 4. Co. 16. See alſo James's Caſe, 4. Co. 17. and Oxford *v.* Croſs, 4. Co. 18.

Hughs *againſt* Farrer.

CASE 17.

ACTION FOR WORDS, *viz.* "Thou art a witch, and didſt "bewitch my mother's drink." And being afterwards deſired to know, Why ſhe called her witch? ſhe anſwered, "If I called "her witch, we will prove her a witch, and anſwer what we "have done." Upon not guilty pleaded, and verdict for the plaintiff, it was moved in arreſt of judgment, that for theſe words an action lies not, becauſe they are general words, and ſhew not any ſpecial hurt to the drink, ſo not within the ſtatute of 1. *Jac.* 1. c. 12. (*b*) if there be no hurt to the perſons or goods.—But ALL THE JUSTICES, except WHITLOCK, conceived that the action well lies; and it was adjudged for the plaintiff. Words imputing *witchcraft* are actionable, although no conſequential damage be ſhewn. Poſt. 282. 474. 480. 1. Jones, 197. 325. 1. Roll Abr. 45. 1. Com. Dig. 176.

(*b*) Repealed by 9. Geo. 2. c. 5.

Lady Cavendiſh *againſt* Middleton.

CASE 18.

Trinity Term, 4. *Car.* 1. *Roll* 243.

ACTION UPON THE CASE. Whereas the ſaid lady, by *Ralph Buck*, her ſervant, having bought of the defendant twelve beaſts for fourſcore pounds, paying for them twenty pounds in hand, and was to pay ſixty pounds reſidue at the end of the An action of *aſſumpſit* will lie for money paid by miſtake, which the defendant *ex æquo et bono* ought to refund.—Jones, 169. 1. Roll Abr. 106. 1. Show. 68. 1. Vezy, 198. Moſes *v.* M'Farlan, 2. Burr, 1005. 4. Burr. 2133. Dougl. 656. 3. Mod. 261. 1. Term Rep. 286. 2. Term Rep. 370.

month,

LADY CAVENDISH *against* MIDDLETON.

month, which twenty pounds the ſaid *Ralph Buck* immediately paid, and the ſixty pounds reſidue he paid for the plaintiff to the defendant at the end of the month, and after died; that the defendant, after the ſaid *Buck*'s death, demanded of the plaintiff again the ſaid ſixty pounds, affirming it was not paid unto him; whereupon the plaintiff, *fidem adhibens* to his aſſertion, paid unto him the ſaid ſixty pounds, *ubi reverâ* he had received it before: and upon this deceit the action was brought.

SERJEANT CREW moved in arreſt of judgment (after verdict upon not guilty pleaded, and found for the plaintiff), that this action lies not, but ſhe ought to have brought an action of *account*, as for money unduly received.

(*a*) Poſt. 503. Cro. Eliz. 644. Yelv. 70. Moor, 854. Cro. Jac. 69.

But ALL THE COURT conceived, that the action well lies, although the plaintiff might have brought an action of account (*a*). Whereupon it was adjudged for the plaintiff.

CASE 19.

Viſcount Say and Seal *againſt* Stephens.

Ante, Page 135.

A writ of error does not lie on 2. *Rich.* 2. c. 2. for an action of *ſcan. mag.* Poſt. 163. 286. 535.

VISCOUNT SAY AND SEAL having had judgment to recover, a writ of error was brought to remove the record into the exchequer chamber, upon the 27. *Eliz.* c. 5. which gives a writ of error upon a judgment given in actions upon the caſe, debt, detinue, covenant, account, ejectment, or treſpaſs, firſt commenced there where the king's majeſty ſhall not be a party.

Jones, 195. 423. 3 Cro. 142 294. 1. Sid. 143. 1. Vent. 49. Ley, 82. Raym. 275. Cro. Jac. 171. Cro. Eliz. 294. Ld. Raym. 954. 5. Com. Dig. 287. See the Caſe of Lloyd v. Skutt, Dougl. 351.

It was moved, that the writ of error is not allowable, becauſe it is given in ſeven ſeveral actions there enumerated, and is not allowable in any other action, as in replevin, *ſcire facias*, *&c.*: and although it be here termed an action upon the caſe, yet it is more than an action upon the caſe, for it is in a far higher degree, and founded upon the 2. *Rich.* 2. c. 5. and is for the king and party.

And of that opinion were HYDE, *Chief Juſtice*, JONES, and WHITLOCK, that this action is out of the ſtatute; for the ſtatute is to be intended in actions upon the caſe, and not in other actions, nor to this action, which is SCANDALUM MAGNATUM, and grounded eſpecially upon the ſtatute, and the 27. *Eliz.* c. 5. being to alter the courſe of the common law, ought not to be extended to other actions than what are mentioned in the ſtatute: and it was ſaid, that after the ſaid ſtatute no writ of error hath been brought upon ſuch actions; and it is intendable, that if a writ of error might have been brought, it would have been practiſed before theſe times. But the other objection, that it was brought by the king and the party was not much regarded, for ſo are actions upon the caſe for the king and the party, and debt for not ſetting out tithes; yet it is a common courſe upon thoſe actions to have writs of error in the exchequer chamber: and it was ſaid, that if the lords in parliament had intended that this ſhould be examined by a writ of error any where but only in parliament, they peradventure would not have agreed unto it.

1. Co. 87. b. Co. Lit. ſect. 108.

But I doubted thereof, and delivered not any opinion; for I conceived it more proper to have it diſputed in the exchequer chamber

chamber when the writ of error ſhall be returned, as it hath been in other caſes where a writ of error hath been brought upon a *ſcire facias*, and been adjudged there that it lies not, than for us to diſpute it, being a matter of our own judging (*a*). Poſt. 300.

(*a*) Ld. Raym. Poſt. 286. 954.

Long *againſt* Nethercote.

CASE 20.

Trinity Term, 4. *Car.* 1. *Roll* 43.

ERROR of a judgment in *Sudbury*, in debt upon a leaſe for years by the aſſignee of a reverſion.

If debt by the aſſignee of a reverſion do not ſhew the deed, and lay the *venue* where the land lies, or if an inferior court erected within memory award proceſs *ſecundum conſuetudinem curiæ*, it will be bad on demurrer. Poſt. 184. 188. 1. Saund. 237. Plowd. 150. a. 1. Term Rep. 316.

THE FIRST ERROR aſſigned was, For that the court is held by virtue of letters patents of *Queen Mary*, and the proceſs is awarded *ſecundum conſuetudinem curiæ*, which cannot be by cuſtom where the court is erected within time of memory.

THE SECOND ERROR aſſigned was, Becauſe the action of debt is brought ſuppoſing a demiſe in *Sudbury* of lands in *D.* in the county of *Eſſex*, whereas it ought to be brought in *Eſſex*, being brought upon the privity of eſtate, and not upon the contract, the plaintiff being aſſignee of the reverſion; for where the action is brought by the leſſor upon the privity of contract, it was ſaid, the action might be brought where the demiſe was made, although the land be in another county, and is well enough; but where the action is brought by one as aſſignee of a reverſion, it ought to be brought in the county where the land lies, and not where the demiſe was made.

THE THIRD ERROR aſſigned was, Becauſe he claims by grant of a reverſion, and doth not ſhew that it was by deed, and without a deed or fine a reverſion cannot paſs.

And, for THE FIRST and THE THIRD Errors principally, the judgment (not being upon verdict, but upon demurrer) was reverſed.

Darroſe *againſt* Newbott.

CASE 21.

ERROR of a judgment in *Bridgewater*. The error aſſigned was, For that in an action on the caſe on *aſſumpſit*, the parties being at iſſue, a demurrer was joined upon the evidence, and thereupon the jury diſcharged; and afterwards judgment was given for the plaintiff, and a writ of enquiry of damages awarded, and damages found, and judgment thereupon; where the jurors who came to find the iſſue, although by the demurrer they were diſcharged of the iſſue, yet ought to have aſſeſſed damages conditionally if judgment ſhould be given for the plaintiff. And in proof thereof was cited *Scholaſtica's Caſe*, *Plowd.* 408. the *Old Book of Entries*, 146. in *Demurrer* 12. & 13. *et ibidem* 237. *Forger de Faux Faits*, 11.

On demurrer to evidence the jury may aſſeſs the damages, or they may be aſcertained on a writ of enquiry. Ante, 32. Poſt. 153. Co. Lit. 72. a. 5. Co. 104. 10. Co. 119. 1. Lev. 87. Hardres, 112. Ld. Raym. 60. Salk. 284. Bull. N.P. 313. Carth. 362. 4. Bac. Abr. 137. 2. Com. Dig. 622. Dougl. 112. 134. 218. 222. 224, 225.

And it was ſaid by THE COURT, If theſe precedents be good law, then it may be enquired of by the ſame jury conditionally; but it may be as well enquired of by a *writ of enquiry* of damages, when the demurrer is determined; and the moſt uſual courſe is, when there is a demurrer upon evidence, to diſcharge the jury without more enquiry. *Vide Old Book of Entries*, *fol.* 551. *Treſpaſs in Arſer*, 1.

Sir

Case 22.

Sir Humphry Tufton and Sir John Aſhley's Caſe.

If in ingroſſing the entry of judgment in *quo warranto* upon a *diſ. claimer* the date of the patent be omitted by the negligence of the clerk, it may be amended by the Paper-book, and hearing evidence as to the intention of the parties. Poſt. 322.

Poph. 180. 8. Co. 156. b. 3. Mod. 7. 167. 8. Mod. 58. Stra. 843. Ld. Raym. 1518. 2. Burr. 1098. 2. Com. Dig. 314. 3. Bac. Abr. 96. Cowp. 407. 425. 841. 1. Term Rep. 782. 2. Term Rep. 707. 3. Term Rep. 349. 657. 749.

QUO WARRANTO againſt the corporation of *Maidſtone*, for claiming divers liberties in the village and pariſh of *Maidſtone* (in which pariſh one houſe called THE MOTE, wherein *Sir Humphry Tufton* inhabited, and a great houſe called THE ARCHBISHOP'S PALACE, which was conveyed to *Sir John Aſhley*, were ſituated); and a judgment was entered by diſclaimer, with conſent of the parties, "*virtute vel prætextu literarum patentium gerent.* date *anno* "*decimo ſeptimo Jacobi regis.*" But becauſe theſe words, "*gerent*, "date *anno decimo ſeptimo Jacobi*," were in the margent, and by reaſon of a ſtroke made croſs the ſaid words the clerk had omitted them in the ingroſſing the judgment (which was entered upon record "*anno ſecundo Caroli regis*"), it was now moved this Term, that thoſe words might be interlined, and the record amended.

But it was much oppoſed by HENDEN, *Serjeant*, and MR. NOY, of counſel for *Sir Humphry Tufton* and *Sir John Aſhley*, whom the cauſe concerned; for they ſaid, that albeit it is true that they were omitted by the negligence of the clerk, and the Paper-book was fair, without interlineation or groſſing, yet it cannot be amended being in another Term, much more in another year, eſpecially in the king's caſe; and that none of the ſtatutes of amendments extend to caſes of *quo warranto*, or ſuits where the king is party; and that the amendment will alter the record in ſubſtance; for whereas their ſuit was to be freed from thoſe liberties by *monſtrans* of any charters, now by this amendment they will be freed only from liberties claimed by the charter of *decimo ſeptimo Jacobi*, whereas there were other charters pretended, viz. *in anno ſecundo Elizabethæ*, from which they deſired to be freed.

But upon great examination of this omiſſion, and upon certificate of THE ATTORNEY GENERAL, that theſe words omitted, viz. "*gerent.* date *anno decimo ſeptimo Jacobi*," were inſerted by him with his hand, and written in the margent of the Paper-book in the ſide of the book, and that it was intended by the parties that this diſclaimer ſhould not extend further than to liberties granted by the charter of *decimo ſeptimo Jacobi*, and not to liberties granted by former charters, and that the ſtroke which was made croſs the ſaid lines was uncertain whether voluntarily done or when done, and upon examination of divers witneſſes that ſuch was the agreement, it was held by ALL THE COURT to be amendable, by the courſe of the common law, as well in another Term as in the Term when it was entered, and as well in the king's caſe as of a common perſon; and being merely a miſpriſion of the clerk, by the miſguiding of the Paper-book, by the examination of all the circumſtances, it is no more than when a ſpecial verdict is miſ-entered, which is rectified by the notes of the clerk of the aſſiſe. Whereupon it was awarded to be amended, and was amended accordingly.

Kendal *againſt* Fox.

CASE 23.

Trinity Term, 3. *Car.* 1. *Roll* 746.

EJECTMENT. Upon a ſpecial verdict the caſe was, That *Nicholas Kendal* and *Lowda* his wife being jointly ſeiſed by purchaſe during the coverture for their lives, remainder to *Walter* their eldeſt ſon in tail, remainder to *William* their ſon in tail, remainder to the right heir of *Nicholas*; afterward *Nicholas* by deed, with letter of attorney, enfeoffs the ſaid *William* and his wife, and the heirs of the body of *William*, remainder to the right heirs of the ſaid *Nicholas*, with warranty againſt all perſons; and after levies a fine to two ſtrangers of the ſame land to them and their heirs, with warranty againſt all perſons; and they render it to him for a week, remainder to the ſaid *William* and his wife, and to the heirs of the body of *William*, remainder to the right heirs of *Nicholas*. Afterward *Nicholas* dies; *Lowda* the wife enters, and dies; *Walter* the eldeſt ſon enters; *William* and his wife enters, and lets to the plaintiff.

Huſband and wife being tenants for life, with remainder to the eldeſt ſon in tail, remainder to his youngeſt ſon in tail, the huſband makes a feoffment to himſelf for life, remainder to his youngeſt ſon in tail, with warranty which deſcends to his eldeſt ſon, the entry of the wife by 32. *Hen.* 8. c. 34. ſhall not remit the eldeſt ſon to his eſtate tail, for he is bound by the warranty.

S. C. Jones, 199. 2. Roll. Ab. 421. 1. Co. 96. b.

The firſt queſtion was, Whether this warranty made by *Nicholas* upon the feoffment, being a collateral warranty, and deſcending upon *Walter* the eldeſt ſon, be totally avoided by the entry of *Lowda*?

And, Whether the *remitter* of the wife be alſo *remitter* to *Walter*, and the warranty diſcharged?

And IT WAS HELD, that it was not; for the warranty being deſcended, and attached before the entry of the *feme*, although ſhe be free and not bound by the warranty, yet he in remainder being bound, that eſtops the remitter. *Vide* 44. *Aſſ.* 35. 44. *Edw.* 3. 30. And upon the firſt argument by MAYNARD, *for the plaintiff*, and CALTHROP, *for the defendant*, it was adjudged for the plaintiff (*a*).

Co. Lit. 227. a. 390. 10. Co. 97. b.

(*a*) A writ of error was brought in the Michaelmas Term, 5. Car. 1. and the exchequer chamber on this judgment in judgment affirmed. 2. Roll. Abr. 741.

Anonymous.

CASE 24.

ERROR of a judgment in a *quare impedit* for the church of *Leckhamſted*: and therein the judgment being for the plaintiff, and the value of the church found to be fourſcore pounds *per annum*, a writ of error was brought of the judgment before the *exigi facias*, and after the record removed; and the judgment being affirmed, and having depended a year and more, it was moved, that according to the 3. *Hen.* 7. c. 10. which appoints damages and coſts to be allowed where writs of error are brought *pro delatione executionis* (*b*). —THE COURT here awarded, that the defendant in the writ of error ſhould have damages for a year (during which time the writ of error was depending) according to the value of the church found by the verdict, which was 80l. *per annum*; and they awarded him eighty pounds beſides coſts, according to the precedent in 6. *Edw.* 6. *Dyer*, 77.

Coſts allowed in a *quare impedit*, on error by the plaintiff before the *exigi facias*, and after the record removed.

Poſt. 175. 402. 425. Cro. Eliz. 617. 1. Lev. 146. 1. Vent. 166. 4. Mod. 245. 1. Bac. Abr. 524. Sayer's Law Coſts, 200.

Strange, 1072. *contra*. *Sed vide* Strange, 931. 1084. *ac*. Dougl. 752. *in notis*.

(*b*) See 13. Car. 2. c. 2. and 8. & 9. Will. 3. c. 11.

Royſon's

Case 25.

Royſon's Caſe.

Perſons who forſwear themſelves in juſtifying bail before a Judge, are liable to the puniſhment of wilful and corrupt perjury; and if committed or confeſſed in court, may be ſentenced immediately to the pillory, &c.
1. Scyles, 277. Cro. Jac. 256. Salk. 84. Strange, 185. 384. 564. 6. Mod. 73. 4. 2. Hawk. P. C. 214. 229.

ROYSON, becauſe he offered himſelf to be bail in an action before JUSTICE WHITLOCK (and upon his oath affirming himſelf to be a ſubſidy-man, and to be aſſeſſed four pounds goods in the ſubſidy-book—being farther examined what he paid, and other queſtions, and confeſſing that he was not any ſubſidy-man), was by him committed, and the next day brought by the marſhal into the king's bench; and being examined of this miſdemeanor, ſubmitted himſelf to the grace of the Court, and confeſſed that he had been bail in other actions, and had ſworn that he was a ſubſidy-man, whereas he now confeſſed in court that he was not: for this cauſe he was preſently adjudged to be committed to priſon, and to ſtand upon the pillory, with a paper mentioning his cauſe, *viz.* "FOR FALSE BAIL," and to be brought to the court of king's bench, common pleas, and exchequer. And this upon his confeſſion was recorded in court, without other proceedings againſt him.

Bl. Com. 284. 1. Com. Dig. 480. Tidd's Practice, 140, 141. 1. Hawk. P. C. 321.

Case 26.

Green *againſt* Guy.

If a ſtatute appoint an offence to be determined in any of the *king's courts of record*, it can only be tried in *Weſtminſter-hall*.
Ante, 112.
Jones, 193. Dyer, 236. Cro. Jac. 538. Cro. Eliz. 737. Salk. 178. 373. Carth. 146. 2. Bl. Rep. 906. 1. Com. Dig. 227.
Sed vide 4. Inſt. 164. 2. Hawk. P. C. 28. 2. Hale, 29. 3. Term Rep. 362. 442.

INFORMATION for the king and himſelf before the juſtices of aſſiſe in the county of *Eſſex*, upon the 21. *Hen.* 8. c. 13. for non-reſidency for eleven months upon his church of *Little Thurrock*, in the county of *Eſſex*.

The defendant pleaded the ſtatute of 21. *Hen.* 8. c. 13. that one who hath two benefices ſhall be reſident upon the one, and that he was lawfully preſented, inſtituted, and inducted, as well to the vicarage of *Edgeware*, in the county of *Middleſex*, as to the rectory of *Little Thurrock*, and that he was all the time in the information mentioned reſident upon his ſaid vicarage of *Edgeware*.

The plaintiff thereupon demurred.

HENDEN, *Serjeant*, alledged the cauſe of demurrer to be, For that he did not ſhew a diſpenſation, as in *Boyton's Caſe*, cited 4. *Co.* 119.

But to that point no reſolution was given: for in regard this information was brought before the juſtices of aſſiſe and *oyer et terminer*, and the ſtatute doth not give it but only in the king's courts, where there may be eſſoign, *gager de ley*, or protection; therefore notwithſtanding the ſtatute of 21. *Jac.* 1. c. 4. which appoints that informations taken by inqueſts before juſtices of aſſiſe or of *oyer et terminer* ſhall be determinable there, IT WAS RESOLVED, upon conference with the other Juſtices, that this information lieth not before them. And judgment was given for the defendant. *Vide Co.* 19. *Gregory's Caſe, and* 6. & 7. *Eliz. Dyer*, 236.

Hilary

Hilary Term,

4. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Sir William Withipole's Caſe.

CASE 1.

Ante, fol. 134.

THE firſt day of this Term *William Withipole* was arraigned upon an indictment of murder found in this vacation in *Suffolk* before commiſſioners of *oyer et terminer*, and certified hither by *certiorari*; and upon his arraignment he deſired to have counſel to plead for him *ore tenus*, pretending he had matter in law to plead.—But THE COURT denied it, unleſs he would ſhew to them ſome exception in law, for which they ſhould ſee cauſe to appoint him counſel; and then MR. HOLBORN ſhould be aſſigned for him: and THE COURT ſaid, any other might be, though not aſſigned.

A priſoner arraigned for murder cannot have counſel aſſigned to him unleſs he ſhew ſome exception in law, and then he may have counſel without aſſignment.

R. 9. 10. 2. Hawk. P. C. Poſt. 175. 365. ch. 39. ſ. 5.

Afterwards the ſaid MR. HOLBORN, being aſſigned his counſel, moved, that he ought not to be arraigned upon this indictment, becauſe he had been *autrefois arraign* upon an inquiſition of murder found before the coroner, and had pleaded thereto, &c. and ſo concluded his plea by pleading not guilty to the felony.—But it was held by ALL THE COURT, that this was no cauſe of plea; for where he is not convicted or acquitted, he may be arraigned upon a new indictment. But to avoid that doubt, that he ſhould not be queſtioned upon both, it was ruled, that the firſt ſhould be quaſhed as inſufficient.

Autrefois arraign on an *inquiſition* is no bar to an arraignment on an *indictment* for the ſame offence; for the Court may quaſh the inquiſition.

3. Burr. 1468. 1. Hawk. P. C. ch. 34. ſ. 1. 1. Bl. Rep. 461. 2 Hawk. P. C. 523. 534. 4. Co. 45. a. Foſter, 106. Dougl. 240.

Then it was moved by HOLBORN, that one of thoſe indictors was outlawed in treſpaſs.—But becauſe he had not the record ready, and the Court conceiving it to be alledged by him in delay of juſtice only, therefore THE COURT ordered him to anſwer; and he pleading not guilty, they commanded to have a ſufficient jury to try him, returnable *Octabis Purificationis*.

Qu. If outlawry in treſpaſs is any objection to a grand juror.

Jones, 198. Ante, 134. 2. Hale, 155*. 2. Hawk. P. C. c. 25. ſ. 16. c. 39. ſ. 4.

Forger *againſt* Sales.

CASE 2.

DEBT upon an obligation againſt the defendant for an hundred pounds, as ſon and heir of *William Sales*; and declares, That *William Sales*, by his obligation here ſhewn, had obliged himſelf in two hundred pounds, &c. and omitted theſe words which were in the obligation, "*Et ad eandem ſolutionem faciendum obligo me et hæredes meos.*" The defendant pleaded *riens per deſcent*; and it was found againſt him.

Qu. If in debt on bond againſt an heir with a *profert in curia*, the declaration can be amended in the omiſſion of "*and my heirs*," by the miſtake of the clerk who drew it.

3. Bac. Ab. 693. and the caſes there cited. Salk. 50. 134. 668. 1. Cromp. Prac. 108. Stra. 954. 1197. 1. Burr. 321. 1. Wilſ. 33. Ld. Ray. 133. Dougl. 361. 1. Term Rep. 783. 3. Term Rep. 349. 657. 749.

It

Forest *against* Salke.

He now moved in arrest of judgment, that these words being omitted, it doth not appear the heir was bound.

But it was prayed on the other part, that it might be amended, because it was the mere default of the clerk, who having the obligation before him omitted those words; and the clerk, being examined, confessed, that he had the obligation and instructions to draw it against the defendant *as heir*, and that it was a mere misprision of himself.

Ld. Ray. 134. Burr. 1257. Dougl. 647. 718.

Jones, *Justice*, conceived it not amendable, because it is the substance of the declaration; as where one declares in the *debet et detinet*, where it ought to be in the *detinet* only, as 22. *Edw.* 4. 21. it is not amendable.—But Myself and Whitlock conceived it to be amendable, it being merely the default of the clerk, when he had the obligation before him: and the action is brought against him *as heir*, and so he is termed in the obligation itself, and it is merely the omission of the clerk; which is well amendable.—And Hyde, *Chief Justice*, inclined to this opinion: but to avoid further question, it was appointed to be amended by consent, and that the defendant should plead *de novo*.

Case 3.

Audley *against* Halsey.

Hilary Term, 3. Car. 1. Roll 943.

Goods taken upon an *extent*, *three days before* a commission of bankrupt issues, cannot be sold by the commissioners, although they are not delivered to the creditor by the sheriff upon a *liberate* until *three days after* the issuing the commission.

Post. 166. 176, 177.

3. C. Jones, 202. 2. *Hen.* 4. pl. 14. 1. Roll. Ab. 893. Moor, 873. Cro. Eliz. 174. 181. 3. Co. 171 a. 1. Leon. 144. 2. Show. 480. Bunb. 202. Stra. 982. 978. Bull, N. P. 42. 1. Bl. Rep. 65. 2. Burr, 20. 1. Com. Dig. 520.

TROVER of goods on the 25th *Nov.* 3. *Car.* 1. Upon not guilty, a special verdict was found, "That one *John Hill* and "*Alice Squire* were possessed of those goods, and used the trade of "merchandize; and being so possessed, were bound to the defen-"dant, 21. *Jac.* 1. in a statute, acknowledged according to the "23. *Hen.* 8. c. 6. for a true and just debt; and that being forfeited, "he sued AN EXTENT upon that statute, 30th *October*, 3. *Car.* 1. "directed to the sheriffs of *London*; and that they, by virtue of that "EXTENT, on 31st *October*, 3. *Car.* 1. extended those goods (the "writ being returnable *in Crastino Animarum*), and returned the "writ and inquisition into the chancery: that on the 3d *November*, "3. *Car.* 1. the said *John Hill* and *Alice Squire* became bankrupts, "being indebted to the plaintiff, and to divers others for true and "just debts: that upon the 6th *November*, 3. *Car.* 1. the defendant "sued a LIBERATE upon that extent, and those goods the same "day were delivered by the sheriffs according to the appraisement "in the extent: that afterward, *viz.* upon the 8th *November*, the "plaintiff and others sued out the commission of bankrupts against "the said *Hill* and *Squire*, and the commissioners, by virtue of their "commission, sold those goods to the plaintiff upon the 23d of "*November*, 3. *Car.* 1.; and that the defendants afterward, *viz.* the "25th *November* the same year, converted them, &c." *Et si super totam, &c.* And it was argued several days at the bar.

The sole question was, Whether *John Hill* and *Alice Squire* becoming bankrupts after *the extent*, and before *the liberate*, the sale of the commissioners to the plaintiff, after the goods delivered upon the *liberate*, be good?

Salk. 108. 3, Cooke's Bank. Laws, 2d edit. p. 404. 406. Com. Dig. 308. 2. Espin. Dig. 330. Dougl. 395. 2. Term Rep. 133. And see

Nov

Noy and FARRER, *for the plaintiff*, argued, that this ſale is good; for notwithſtanding this *extent*, the property of the goods remain in the conuſors, and by the *extent* are only ſeized into the king's hands, but that ſhall not diveſt any property from the conuſors; for they are but as it were in protection of the king; and then, when the conuſors become bankrupts before the *liberate*, thoſe goods are in the power of the commiſſioners to ſell and diſtribute amongſt the creditors. And they relied eſpecially upon the caſe in *Dyer*, 67. where goods being extended, yet were ſubject to be ſeized for the king's debt: and they alſo relied upon the 13. *Eliz.* c. 7. and chiefly upon the 21. *Jac.* 1. c. 15. whereby it is proved, that the commiſſioners may ſell goods or lands, notwithſtanding judgments, ſtatutes, executions, or extents, not ſerved or executed; and that they ſaid was not done until the *liberate*, otherwiſe there would be a miſchief; for then there may be *an extent*, and no *liberate* be ſued after upon it, as the book of 31. *Hen.* 6. *Brooke* "*Statute*," 41. R. 344.

AUDLEY *againſt* HALSEY.

But ALL THE COURT reſolved, and ſeverally delivered their opinions, that thoſe goods, extended before they became bankrupts, and delivered by the *liberate* after they became bankrupts, could not be ſold by the commiſſioners, becauſe they being extended, are *quaſi in cuſtodiâ legis*, ſo as the conuſors have not any power to give, ſell, or diſpoſe of them; and although by the *extent* the conuſee hath no abſolute intereſt nor property in them until the delivery by the *liberate*, and at the return of the writ may refuſe them for being over-valued, yet that is for advantage of the conuſee; for the extent is, "*capias in manus noſtras ut eas liberari facias*," and they are as goods gaged or diſtrained; which cannot be forfeited by outlawry, or taken in execution from the party who hath them in gage, or by way of diſtreſs, without payment of the money. *Vide* 30. *Hen.* 6. *fo.* 10. 22. *Edw.* 4. *fo.* 11. 34. *Hen.* 8. *Brooke* "*Pledges*," 28. & 13. *Rich.* 2. *Brooke* "*Pledges*;" for the goods are bound by the *teſte* of the writ of extent or execution ſued, as 2. *Hen.* 4. *fo.* 14. 4. *Hen.* 6. *fo.* 58. & 8. *Co.* 171. The goods are bound by the execution ſuing, but the land is bound by the judgment; and by the extent they are to be taken by the conuſee, and it is good againſt the conuſor: and the caſe here is ſtronger, for that the extent is returned before they became bankrupts, and the delivery by the *liberate* was before the commiſſion of bankrupts was ſued out: and it is not like unto the caſe of 13. *Edw.* 4. *Dyer*, 67.; for there, although the goods were extended, yet they were not delivered to the conuſee, and the writ was not returned; and the writ of privilege was for debt due to the king, wherein the king hath his prerogative by the common law: and yet it is ſaid there, that others were of a contrary opinion. Alſo, when the writ of *liberate* is ſued, it hath relation to the writ of extent, and they be *quaſi* but one extent; and the goods are ſo bound by the extent and appraiſement, that the conuſor hath not any more property in them, but *ſecundum quid*, and not *ſimpliciter*; that is, if the conuſee refuſe to accept them: for it is a conditional writ to deliver them to the conuſee, if he will accept them; and when he accepts them, they are bound *ab initio*.—And JONES cited a caſe, in

Cro. Eliz. 47. Judg. Ref. 124. Poſt. 177.

Plow. 62. b.

Cro. Jac. 453.

Hob. 339.

Audley *against* Halsey.

Post. 282. Winch. 20. 50. Latch. 20. 52. Hutt. 52.

the common pleas, *Brumpsted v. Bathurst*, where an under-sheriff took an obligation for his fees, for an extent serving before the *liberate*; and it was held not allowable, but he ought to have staved until the *liberate*. And whereas it was objected, that the writ is not served nor executed until delivery of the goods upon the *liberate*, and therefore the commissioners had power of them, they all conceived, that the statute being with an exception, "where exe-"cution or extent is served or executed," that this is to be accounted the executing of an extent, when the goods be appraised and the writ returned; but so long as they remain in the hands of the conusors, they may be sold; but when they are delivered by the *liberate*, the commissioners have no power to meddle with them. And it was said, that the 21. *Jac.* 1. c. 15. provides, that goods attached by foreign attachment in *London* shall be sold by commissioners; which proves, that after the 13. *Eliz.* c. 7. until the 21. *Jac.* 1. c. 15. the commissioners had no power to meddle with goods taken upon a *forcign attachment*, yet they are but as a pledge to draw the party to answer; and if he appear, the foreign attachment is discharged. Wherefore this extent being returned served, the goods are not subject to other executions, nor to the power of the commissioners. And it was therefore adjudged for the defendant.

Case 4.

Bach *against* Gilbert.

A *vill* and a *parish* shall be intended all one until the contrary be shewn.

Co. Lit. 125. b. 6. Co. 14. b. 11. Co. 25. b. Cro. Jac. 120. 263. Sayer, 119. Burr. 333. 337.

ERROR upon a judgment in the common pleas in an ejectment. The error assigned, For that *Jane Herlakenden apud D.* demised an house and forty acres of land in *D. per nomina omnium messuagiorum, terrarum, et tenementorum suorum in* PAROCHIA DE D. *seu alibi in comitat. Canc.* Upon not guilty pleaded, the plaintiff surmised, that the said *parish of D.* is in *Rumney*, within one of the Cinque Ports, *ubi breve domini regis non currit*; and that *Allington* is the next village adjoining thereto in the county of *Kent*; and prayed a *venire facias* upon it: and thereupon a *venire facias* was awarded *de vicineto de Allington*; and by them it was found for the plaintiff.

And it was now assigned for error, That this *venire facias* was misawarded, and a mis-trial not aided by the statute; for the surmise ought to have been, that *D.* is within the *Cinque Ports*, and not that the parish of *D.* is within the *Cinque Ports*; for *D.* may be a village of itself, and the *per nomina omnium terrarum, &c. in parochiâ de D.* may be the same place.

But THE COURT held, that *the vill* and *the parish* are intended all one, unless the contrary be shewn, and that it is no error. Wherefore rule was given that the judgment should be affirmed.

Jenks's

Jenks's Caſe.

CASE 5.

DEBT upon an obligation againſt the defendant as brother and heir to *J. S.* The defendant pleaded *riens per diſcent* (*a*) from his ſaid brother; and iſſue being thereupon, a ſpecial verdict was found, that the obligor was ſeiſed in fee of ſuch lands, and had iſſue, and died ſeiſed, and the iſſue died without iſſue, whereupon the lands deſcended to the defendant, as heir to the ſon of his brother. *Et ſi ſuper totam, &c.*—And, after argument, IT WAS ADJUDGED for the defendant. For although he is chargeable as heir upon this bond, yet he is but a collateral heir; and it ought to be ſpecially declared, and the iſſue ought to be joined accordingly: but upon this iſſue it is found againſt the plaintiff; for the defendant has nothing as immediate heir to his brother, but by deſcent from the ſon of his brother; and if he would charge him, he ought to have made a ſpecial declaration. Wherefore it was adjudged for the defendant.

In debt againſt a *collateral heir*, the *meſne diſcent* muſt be ſpecially ſhewn in the declaration.

Cro. Eliz. 24.
Dyer, 366. 368.
1. Lutw. 507.
Plow. 441.
F. N. B. 120.
Cro. Jac. 261.
Pop. 155.
1. Vern. 400.
2. Ch. Caſ. 175.
Carth. 127. *in point.*
2. Bl. Rep. 1099.
Bull. N. P. 176. 300.

(*a*) See 29. Car. 2. c. 3. and 3. & 4. Will. & Mary, c. 14. Poſt. 296.

5. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

James Hyott *againſt* Hoxton and Broughton.

CASE 1.

ERROR in the king's bench, upon a judgment *in audita querela* in the common pleas by *Hoxton* and *Broughton*, ſurmiſing, WHEREAS they were bound in a ſtatute, acknowledged before the mayor of *Hereford* to *Hyott*, and he ſued execution upon that ſtatute, and thereupon the ſaid *Hoxton* was taken, and let at large by the ſheriff of *Salop*, with the aſſent of the ſaid *Hyott*, whereby they were to be diſcharged of any other execution againſt them; that notwithſtanding the ſaid *Hyott*, to vex the ſaid *Hoxton* and *Broughton minus juſte*, by virtue of an inquiſition found before the ſheriff of *Salop* and the ſheriff of *Hereford*, ſuch a day and year, the lands and goods mentioned in the inquiſition *eidem Jacobo deliveravit*, where it ought to have been by the two ſheriffs *deliberari procuravit*; otherwiſe it is inſenſible that the plaintiff ſhould deliver to himſelf.

In *audita querela*, if the plaintiff alledge that *one conuſor* was in execution and eſcaped, and that afterwards the *conuſee* "the "lands of the "plaintiff (the "*other conuſor*) "*eidem C. delive-* "*ravit*," where it ought to have been, "by the "two ſheriffs "*deliberari pro-* "*curavit*," yet the declaration is good; for it ſhews a ſufficient *gravamen*, and the defect is only in matter alledged in aggravation of damages.
Ante, 75. 143. Poſt. 240. Co. Ent. 87. Dyer, 297. Cro. Eliz. 809. 3. Bulſt. 308. Jones, 90. Latch. 112. 3. Term Rep. 292. 643.

And this was aſſigned for error, That the declaration was inſufficient, it not appearing that the ſaid goods and lands ſo extended were delivered by any ſheriff but by the party himſelf; and ſo much the rather, becauſe the judgment being, that they ſhall be reſtored to what they loſt, it doth not appear what they loſt, nor what was delivered in execution.

But ALL THE COURT conceived it to be no error; for the writ is good enough, which ſhews ſufficient cauſe of diſcharge; and comprehending that he is *minus juſte* grieved, by delivery of their lands in extent, it is ſufficient without other declaration; and when the declaration is good in point of the cauſe of diſcharge, although the matter be ill in point of aggravation of damages, yet the writ being good, and the iſſue taken upon the cauſe of diſcharge, and found for him, the judgment is good; for the default in the declaration is not material: and as to the objection, that being uncertain, it cannot be referred to enquire what was loſt or taken in execution; THAT may very well be ſupplied by the writ of enquiry of what damages, &c.: and ſo this writ being found, he may be reſtored. Whereupon the judgment was affirmed. *Co. Bk. Ent.* 234.

Case 2.

Beare *againſt* Woodley.

A grant of an annuity in ſeveral ſums, beginning and ending at different times, are ſeveral rents, and cannot be joined in the ſame avowry.

AVOWRY. Upon demurrer the caſe was, *J. S.* grants a rent of fourteen pounds *per annum* out of ſuch land, "HABENDUM "ſeven pounds *per annum* for thirty-eight years, if *J. D.* live ſo "long, payable at *Michaelmas* and the *Annunciation*; and HABEN-"DUM the other ſeven pounds *per annum*, to begin after the death "of *Woodley*, for thirty-eight years, payable at the ſaid two Feaſts; "and if it happen that the ſaid rent of fourteen pounds to be be-"hind, that he may diſtrain."

S.C. Jones, 207. Dyer, 306. 309. 1. Lev. 109. Comb. 329. 347. Salk. 423. 3. Mod. 209. 5. Mod. 72. Cro. Eliz. 340. 637. 651. Yelv. 23. Carth. 342.

The queſtion was, Whether this was one entire rent, or ſeveral rents? for that it is but one grant of fourteen pounds in the beginning, and the diſtreſs is limited for fourteen pounds, ſo it is entire alſo in the diſtreſs.

But ALL THE COURT reſolved, that they were ſeveral rents, becauſe they have ſeveral beginnings and ſeveral endings; and although it be mentioned to be but one in the clauſe of diſtreſs, yet that is to be intended *diſtributive* to each part thereof. Whereupon it was adjudged againſt the avowant. *Vide* 17. *Edw.* 3. *pl.* 76. 17. *Aſſ.* 10. 14. *Eliz. Dyer*, 308. 5. *Co.* 54. 55.

Case 3.

Goſhawke *againſt* Chiggell.

A. being poſſeſſed of a leaſe for 1000 years, GRANTS "all "his term, eſtate, "and intereſt "therein to *B.* "his daughter, "*habendum* to "the ſaid *A.* "and his wife "for their lives, "and after their "deceaſe to *B.*" The firſt grant to *B.* is good, and the *habendum* to *A.* and his wife, with remainder to *B.* is void. Poſt. 400. S.C. Jones, 205. 1. Co. 154. b. 10. Co. 95. a.

EJECTMENT. Upon a ſpecial verdict the caſe was, One *Crogate* was poſſeſſed of a leaſe for a thouſand years of the tenements in queſtion, and by deed poll granted "all his term, "eſtate, and intereſt therein to *Heſter* his daughter, HABENDUM "to the ſaid *Crogate* and his wife for their lives, and after their de-"ceaſe to the ſaid *Heſter*; and if ſhe hath heir of her body, then "to her executors and aſſigns, PROVIDED that ſhe ſhall pay to "*Diana* her ſiſter, after the death of *Crogate* and his wife, ten "pounds *per annum* during her life: PROVIDED ALSO, That if the "ſaid *Heſter* died unmarried, having no iſſue of her body lawfully "begotten, that then this grant to the ſaid *Heſter* ſhould be void, "and then *Diana* ſhould have the term." It was found that *Heſter* was married, and died without iſſue; *Crogate* and his wife died.

The plaintiff claims by leaſe from the executors of *Heſter*, and the defendant claims under *Diana*, and alſo by the executors of *Crogate*. The queſtion was, Whether the plaintiff claiming as executor to *Heſter* ſhall have it?

And it was argued by GRIGGS, *for the plaintiff*, and by POPES, *for the defendant*.

And for the plaintiff was urged, that this is a good grant of the term to *Heſter*, whereby ſhe was intereſted therein, and the *habendum* is void; and the ſecond *proviſo* for the determination thereof is not performed, becauſe ſhe did not die unmarried: and in that point the *proviſo* is good, and the other part of the *proviſo* is to no purpoſe (for ſhe cannot die unmarried and have iſſue of her body lawfully begotten); and therefore is to be rejected. Wherefore, &c.

But

But ALL THE COURT, delivering their opinions *ſeriatim*, conceived, the plaintiff had not any title, but the defendant had good title: for they agreed that the grant was good; and the HABENDUM to the grantor and his wife for their lives, and after to *Heſter*, is void, becauſe it is repugnant to the grant; but the HABENDUM ſhews the intent of the parties, that the executors of *Heſter* ſhall not have it unleſs ſhe be married, and hath heirs of her body: and the PROVISO, "That if ſhe die unmarried, having no iſſue of her "body lawfully begotten, that it ſhould be void," ſhall have this conſtruction, that if ſhe die unmarried, or married having no iſſue of her body (for ſhe may not have lawful iſſue unleſs ſhe be married), then it ſhall be void; for that is expounded by the HABENDUM, that he did not intend that the executors of *Heſter* ſhould have it, unleſs that ſhe had iſſue; ſo by this conſtruction the words of the deed ſtand together: and when it was found that ſhe was married, and died without iſſue, the eſtate to *Heſter* and limitation to her executors is determined. Whereupon rule was given that judgment ſhould be entered for the defendant, unleſs other matter were ſhewn, &c.

COSHAWEN *againſt* CRIGGELL.

Wicks *againſt* Shepherd.

CASE 4.

In the Exchequer.

ACTION FOR WORDS. Whereas he was of a good fame, and a ſuitor to ſuch a woman, to marry her, by which marriage he was likely to have had a good preferment, and was in poſſibility to obtain her; that the defendant malicioufly, and to hinder him of this marriage, uſed theſe words to the ſaid woman (in preſence of others) of the plaintiff: "He is a ſharking fellow, and "getteth his living by deceit, and uſed himſelf violently to his "former wife, and denied her neceſſaries; and is a needy fellow, "and his conditions are wicked; and for his religion, he is a "*Browniſt*." By reaſon of which words the ſaid woman refuſed him, and he loſt his marriage.

In ſlander, *ſpecial damage* is a good cauſe of action, although the words themſelves be not actionable. Poſt. 269.

The defendant pleaded not guilty; and found againſt him: and moved in arreſt of judgment, that theſe words are not actionable.

But after argument, becauſe it was ſhewn that by reaſon of thoſe words he had loſt his marriage, it was held good cauſe of action, and adjudged for the plaintiff: and afterwards judgment was affirmed in a writ of error in the exchequer chamber. And SIR NICHOLAS HYDE, *Chief Juſtice*, propounded it to JUSTICE JONES, JUSTICE HARVEY, and MYSELF, Whether this action was maintainable? And we all agreed, that the action well lies for the loſs which he hath by ſpeaking thoſe words, otherwiſe the words without ſuch circumſtances will not maintain an action; as it is in the caſe of *Anne Davies*, 4. *Co.* 16, 17. a.

Case 5.

Salvin *againſt* Clerk.

Hilary Term, 20. Jac. 1. Roll 466.

If teſtant in tail make a leaſe for the life of the leſſee, and afterward grants the reverſion in fee with warranty, which deſcends upon the iſſue with aſſets, it ſhall be a bar to the tenant, though his right of entry was not taken away. Ante, 58.

Co. Lit. 333. S.C. Jones, 208. S.C. Latch. 64. 72. Floor, 256. 1. Salk. 244. 2. Bac. Abr. 90. *in notis.* Cowp. 622.

EJECTMENT. Upon a ſpecial verdict the caſe was, *Alexander Sydenham* was tenant in tail to him and the heirs males of his body, the reverſion in fee to *John Sydenham* his eldeſt brother. *Alexander* makes a leaſe for three lives with warranty againſt all perſons, the leaſe not being warranted by the 32. *Hen.* 8. c. 28. Afterwards *Alexander*, 16. *Eliz.* levies a fine of thoſe lands with warranty againſt all perſons, and with proclamations to *Taylor*, under whom the defendant claims, and afterward dies without iſſue male, having iſſue *Elizabeth*, mother to *Poynts*, leſſor of the plaintiff. After the death of *Alexander*, the ſaid *John*, 30. *Eliz.* died without iſſue, the ſaid *Elizabeth* being his niece and heir. In 18. *Eliz.* the leaſe for three lives expired; the defendant entered by virtue of a leaſe from *Taylor*; and *Poynts* enters as heir to *Elizabeth*, and lets to the plaintiff, and the defendant ouſts him, &c.

This caſe was oftentimes argued at the bar, and afterwards at the bench; and all the Juſtices were of opinion, that judgment ſhould be given for the defendant.

THE FIRST QUESTION was, Whether this warranty in the fine, admitting that it was not with any proclamations and no non-claim, ſhould make a diſcontinuance in fee, and be a bar to *Elizabeth*, becauſe it did not deſcend by the death of *Alexander* without iſſue upon *John*, who had right of the reverſion, but upon *Elizabeth* his daughter; and when *John* afterwards died without iſſue, *Elizabeth* being his heir, whether ſhe be barred by this warranty; or, whether the warranty were determined by the death of *Alexander*?—But ALL THE JUSTICES, except WHITLOCK, who ſpake not to that point, conceived, that the warranty continues, and is a bar to her; for by the eſtate for life it was diſcontinued, and *Alexander* had a new fee: and then when he by fine grants that reverſion with warranty, the warranty is annexed to the fee, and binds him that hath the right; for the reverſion being diveſted and diſplaced, the fine and warranty enures thereupon; and by conſequence, although the warranty did not deſcend upon *John*, who had the right of reverſion, but upon *Elizabeth*, yet when *John* was dead without iſſue, the right deſcended to *Elizabeth*, and ſhe is barred by the fine; and it is not like to *Seymour's Caſe* (*a*), where the reverſion was not diſplaced, nor a fee gained, as it is here. *Vide* 21. *Hen.* 6. 52. 22. *Edw.* 4. *tit.* "*Diſcontinuance.*"

If tenant in tail make a leaſe for life, and levy a fine with proclamations, and die without iſſue, and five years paſs without entry or claim, the remainder-man is barred. Poſt. 201.—Dyer, 3. Plowd. 378. Cro. Eliz. 200. 3. Keb. 37. 110.

THE SECOND POINT was, Whether this *fine* and *non-claim* for five years ſhall bar the daughter?—AND RESOLVED it was a bar: for when *John*, who had right at the time of the death of *Alexander* with iſſue male, did not proſecute that title, it is a bar, and he ſhall not have the advantage of entry after the death of the tenant for life, becauſe he hath no other title after his death than he had

(*a*) 10. Co. 95.

before;

before; for his title was by the death of tenant in tail without iſſue male, and then he might have brought his *formedon*; and when he did not purſue his title after it firſt veſted, he and his heirs, and all claiming by him, ſhall be barred for ever. And it is not like to the caſe where tenant for life makes a feoffment, and ſo commits a forfeiture, and a fine with proclamations is levied, the leſſor hath title of entry in reſpect of the forfeiture; as alſo when the reverſion falls in poſſeſſion by the death of the tenant for life, and may have election to make his entry within five years after the reverſion falls in poſſeſſion: but here he hath but one title, *viz.* after the death of the tenant without iſſue male, when he might have brought his action of *formedon*, and not to tarry until the death of the tenant for life. Whereupon it was adjudged for the defendant.

SALVIN *againſt* CLERK.

1. Vent. 241. Raym. 219. 3. Co. 78. Shep. Touch. 31. Co. Lit. 333. b. 3. Com. Dig. 359.

Lynner *againſt* Wood.

CASE 6.

TROVER for divers loads of corn. The defendant pleads, and entitles himſelf to them as tithes ſevered: and becauſe the plea amounts but to "not guilty," the plaintiff demurred; and ſhewed for cauſe, that the plea was therefore not good.

In trover for corn, a plea that the defendant was entitled to it as tithes ſevered, amounts to the *general iſſue*.

HENDEN, *Serjeant*, would have maintained this plea, becauſe it concerns matter in the realty, *viz.* tithes, and title is pleaded, as it were a confeſſion of the poſſeſſion in the plaintiff, and as a general bar in action of treſpaſs, and colour given.

1. Roll. Rep. 112. 1. Keb. 305. 1. Brownl. 5. Cro. Eliz. 146. 262. 485. Cro. Jac. 165. 319.

Sed non allocatur; for this action comprehends title in it; and a plea which amounts but to a general iſſue is not allowable, it being ſpecially ſhewn for cauſe of demurrer. Whereupon without argument it was adjudged for the plaintiff.

20. Co. 88. b. 95. a. Latch. 185. Strange, 651. 1. Com. Dig. 224. 5. Bac. Abr. 203.

Anſley *againſt* Chapman.

CASE 7.

Michaelmas Term, 3. *Car.* 1. *Roll* 842.

EJECTMENT of lands in *Tottenham*. Upon a ſpecial verdict the caſe was, *William Lock* was ſeiſed in fee of the tenements in queſtion, and of divers others mentioned in the verdict; and having divers ſons, viz. *Thomas*, *Matthew*, *John*, *Henry*, and *Michael*, and being bound in an obligation, that forty pounds ſhould be paid annually to his wife during her life, made his will, and thereby deviſed all his lands by ſeveral clauſes to ſeveral his ſons; and amongſt others, he deviſed the land in queſtion to *Michael* and *Henry* his ſons, upon this condition, that if they ſell it to any but to *Matthew Lock* his ſon, then he to enter, as of his gift; and adds this clauſe: ITEM, "All the houſes and lands, which I have given "between my ſons, is to this purpoſe, that they all ſhall bear *part*

A deviſe to *A.* upon condition not to ſell but to a particular perſon, and to pay thereout a proportional part towards the payment of an annuity, paſſes *an eſtate for life only*; for the law will not conſtrue it *a fee* without ſome words of *perpetuity*.—Jones, 211. 6. Co. 16. Cro. Eliz. 378. Cro. Jac. 527. 5. Co. 21. Cowp. 43. 235. 299. 637. 1. Term Rep. 411. 2. Term Rep. 656. 3. Term Rep. 356. Co. Lit. 9. b.

"*and*

ANSLEY against CHAPMAN.

2. Lev. 249.
2. Salk. 685.
2. Mod. 25.
2. Vern. 106. 564. 687.
Bulſt. 194.
1. Eq. Ca. Ab. 277.
3. Burr. 1537.
Gilb. Dev. 22.
Cowp. 43.

"*and part like*, going out of all my houſes and lands, towards the "payment of my wife's forty pounds *per annum* during her life, "which I am bound to pay; and which of my ſons refuſe to bear "their part, I will, that he or they enjoy no part of my bequeſt "given unto them; but my gift given to them ſhall go to the reſt "of my well-willing ſons."

The queſtion was, Whether upon all this matter *Michael* and *Henry* have an eſtate *in fee* by this will, or *for life* only? for if it be an eſtate for life only, the plaintiff, who claims under the heir of *Michael Lock*, hath no title.

And it was argued at the bar for the plaintiff, that it was a fee by this deviſe to *Michael Lock*.

FIRST, Becauſe the deviſe is to the eldeſt ſon, who ſhould have taken a fee by deſcent, if not by the deviſe; and he intended every ſon ſhould have a fee as well as his eldeſt.

SECONDLY, By the clauſe, that they ſhall not ſell unleſs to *Matthew*, is intended, that they had an eſtate of inheritance, which they might ſell, as 7. *Edw.* 6. *Brooke* "*Deviſe*."

9. Co. 128. a.

THIRDLY, Becauſe it is deviſed paying ſuch a ſum, *viz.* "every "one his part of the forty pounds *per annum* to the wife;" which implies, that the deviſor intended they ſhould have an inheritance: and it was ſaid, this very caſe was ſo reſolved in the court of wards, by the advice of the two Chief Juſtices and the Chief Baron, that the intention of the teſtator will make it an inheritance. Whereupon, by NOY and GERMYN, judgment was prayed for the plaintiff.

And it was argued by FINCH, *Serjeant*, and WHITFIELD, *for the defendant*, that foraſmuch as there is not one word in the will which ſpeaks of any expreſs intent that he ſhould have a fee, the law will not adjudge it to be ſo, without an intent apparently to be collected out of the words in the will; and they ſaid, that upon argument in the exchequer by all the Barons, after the ſaid reſolution in the court of wards, TANFIELD, *Chief Baron* (who was one of thoſe that gave the ſaid reſolution in the court of wards), was of opinion, that it was not a fee, but for life: and ſo all the other Barons agreed with him; and they produced the record thereof under the ſeal of that court.

And afterwards ALL THE COURT here reſolved, without open argument, that it was but an eſtate for life only that paſſed by this deviſe. For as to the firſt reaſon, before alledged on the other ſide, it was anſwered, That the eldeſt ſon had not any fee by the deviſe, but by deſcent and operation of law. TO THE SECOND, They may be reſtrained from ſelling an eſtate for life; and it doth not appear thereby he intended to give a fee. And TO THE THIRD reaſon alledged, It is not deviſed paying ſuch a ſum, which is a ſum in groſs, as it is cited in *Willock v. Hammond*, but that every one ſhall pay out of his part towards the payment of the forty pounds *per annum* to his wife; which is *quaſi* an annual rent out of the

9. Co. 128. a.
3. Co. 21. a.
6. Co. 16. a.
Cro. Jac. 416.
Cro. Eliz. 378.

the profits of the land, and no ſum in groſs, and therefore no fee given. And as to that objection in the will, that where he deviſeth lands to his ſeveral ſons, that every one ſhould have fee thereby, as well as in a chattel, it is no law, without his expreſs intent may be collected out of the words; otherwiſe the law will not conſtrue it to be fee in prejudice of the heir, without the word "*heirs*," or "*in perpetuum*," or which *tantamount*. Whereupon it was adjudged for the defendant.

Anſwer againſt Claimant.

Thurſby *againſt* Warren.

Caſe 2.

Trinity Term, 4. Car. 1. Roll 217.

ERROR of a judgment in the common pleas, in an *aſſumpſit*, by *Elizabeth Warren*, executrix of *William Warren*, where the plaintiff declares, WHEREAS, upon the 18th day of *July* 1625, the defendant was indebted to the ſaid *William Warren*, being an attorney of the common pleas, in divers ſums of money, *tam pro miſis et ceſtagiis per ipſum* WILLIELMUM WARREN for the ſaid *Thurſby*, laid out at his requeſt, for the proſecuting and defending of divers ſuits for the ſaid defendant, and for his fees in divers Terms, beſides his expences and other ſums of money laid out by the ſaid *William Warren*, as ſervant and ſolicitor to the ſaid defendant, in divers other courts in *Weſtminſter*, at the requeſt of the ſaid defendant, in proſecution and defence of all his ſuits in the ſaid courts, and in the court of *Lynn Regis*, being a court of record; as alſo for his ſalary, and divers other ſums to him due, and to be paid by the defendant for his wages, as ſteward of divers of his courts in the county of *Norfolk*, and yet to him due and unpaid; and alſo in divers other ſums of money expended by him at the requeſt of the defendant, as well about his other buſineſs as for his labour for the ſame, to him due and unpaid: and the defendant being ſo indebted to the ſaid *William Warren*, he, the ſame day and year, at *Lynn* aforeſaid, delivered to him a note in writing, mentioning the ſaid ſums (*a*), amounting to thirty-nine pounds two ſhillings and ninepence, requiring him to pay it. That the defendant, in conſideration of the premiſes, then and there aſſumed and promiſed, that if *James Sedgwick*, an attorney of the common pleas there preſent, would peruſe the ſaid note, and affirm it to be reaſonable, he would pay to the ſaid *Warren* all the ſums mentioned in the ſaid note: and alledgeth in fact, that the ſaid *James Sedgwick*, the ſame day, year, and place, upon view of the note, affirmed it to be reaſonable; and notwithſtanding that the defendant had not paid it to the ſaid *William* in his life, nor to the plaintiff his executrix, *licet ſæpius requiſitus*.

An attorney may maintain an *aſſumpſit*, in conſideration of ſoliciting a cauſe in other courts than that in which he is admitted; and a promiſe to pay him what a third perſon ſhall award for his trouble is lawful.
Ante, 70. 77. 107. 109.
Poſt. 194.
1. Jones, 208.
Cro. Eliz. 425. 760.
1. Roll. Ab. 15.
Hobart, 67.
Lut. 38.
Skin. 217.
Cro. Jac. 520. 570.
Moor, 656.
3. Mod. 98.
2. Stra. 1056.
1. Com. Dig. 140. 453.
1. Hawk. P. C. 542.

The defendant pleaded *non aſſumpſit*; and being found againſt him, and damages aſſeſſed to twenty pounds, and judgment entered,

A writ of error was brought, and the error was aſſigned, Becauſe he demanded fees as ſolicitor in other courts where he was not attorney, which is *maintenance* and unlawful; and then the *aſſumpſit* being void in part, is void in all; ſo that when entire damages were given, and judgment for all, it is error.

(*a*) See 3. Jac. 1. c. 7. the 2. Geo. 2. c. 23. ſ. 23. and Ray. 245. Carth. 57. 147. 4 Term Rep. 124.

And

THURSBY *against* WARREN.

And ALL THE COURT conceived, that an attorney may very well be a ſolicitor for his client in other courts as well as in the court where he is attorney, and is allowable, and a promiſe to pay him for it is lawful; and ſo may a ſervant for his maſter, and it is no *maintenance*, as 19. *Edw.* 4. 3. eſpecially as this caſe is, having laid out money at his requeſt, and giving a note thereof to a ſtranger to view whether reaſonable or not, and a promiſe to pay it if by him thought reaſonable, which of itſelf is a ſufficient conſideration.

Poſt. 194. 2. Com. Dig. 437.

And ALL THE COURT conceived, that a ſolicitor of an inferior rank, which ſolicits cauſes for his clients, may take recompence, and take a promiſe to repay what ſums he ſhall lay out; but if a perſon of ſuperior rank ſhould do it, it were *maintenance*, as it is in 19. *Eliz. Dyer*, 356.

ALL THE COURT thereupon agreed, that the *aſſumpſit* was good, and the judgment was affirmed. See 11. *Hen.* 6. 10. 32. *Hen.* 6. 25. 34. *Hen.* 6. 26.

In *aſſumpſit* the ſtatute of limitations muſt be pleaded, though the declaration alledge a promiſe ſix years before. Ante, 115. Poſt. 163. 294. 381. 1. Vent. 191. 2. Vent. 255. 3. Lev. 110.

NOTE ALSO, that another exception was taken by BANKS, Becauſe the promiſe was upon the eighteenth day of *July* 1621, and the breach aſſigned for not paying upon requeſt was in *September* 1621, and the action was brought in the common pleas in *Michaelmas Term* 3. *Car.* 1. and ſo above ſix years after the promiſe and breach; and then by the 21. *Jac.* 1. c. 16. he ought not to maintain that action.—But becauſe it was not pleaded, though the declaration was in *Michaelmas* 3. *Car.* 1. the original writ not being certified, nor appearing when it was ſued out, THE COURT did not much regard it; and thereupon the judgment was affirmed.

2. Saund. 118. 123. Lutw. 243. 257. Cowp. 215. 3. Term Rep. 124.

This Year in *Trinity Term* there was nothing done remarkable.

Michaelmas

Michaelmas Term,

5. Car. 1. In the King's Bench,

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Gilpin's Caſe.

CASE 1.

If the anceſtor deviſe land in fee to his heir, upon *condition* that he pay his debts within a limited time, the heir ſhall take as a *purchaſor*, and not by *deſcent*.

ERROR of a judgment in *Kingſton*. The error aſſigned was, Becauſe in debt upon an obligation made by his father he pleaded "*riens per deſcent*" the day of the writ; and iſſue being joined thereupon, the jury found, that the anceſtor (whoſe heir he is, and for whoſe debt he is ſued) was ſeiſed in fee of ſuch lands, and by his will deviſed them to the defendant, being his ſon and heir, and to his heirs, upon condition that he ſhould pay his debts within a year, and, if he failed, that his executors ſhould ſell and pay his debts: they alſo find, that he entered and did not pay the debts, and the executors after entered and paid the debts and ſold the lands: and thereupon the court there adjudged, that it was *aſſets* in the heir's hands, becauſe he deviſed it to his ſon and heir in fee; and for that cauſe the error was aſſigned.—But THE COURT here held, that the judgment was erroneous; for although the heir hath a fee, yet he hath it as *a purchaſor*, being ded with ſuch condition. Whereupon rule was given to reverſe that judgment.

Lut. 793. 1. Salk. 233. 1. Leon. 315. Cro. Eliz. 438. Bendl. 63. Plowd. 545. b. *Sed vide* 2. Mod. 286. 6. Mod. 241. Heber, 1. Bl. Ca. Ch. 136.

12. Mod. 48. Lut. 798. Ld. Raym. 728. 1. Salk. 241. *contra*; and in Allen v. Rep. 22. Sira. 1270, it is adjudged that the heir ſhall be in by deſcent. 1. Brown's 1. Com. Dig. 398. 3. Com. Dig. 19. See Powel on Deviſes, 436.

See the ſtatute of 29. Car. 2. c. 3. ſ. 10. & 11. 3. & 4. Will. & Mary, c. 14.

Goodwin *againſt* Sir Richard Moore.

CASE 2.

An infant may ſue either by *guardian* or *prochein ami*, but ſhall defend by *guardian* only.

THE plaintiff, by *Thomas Goodwin*, his *prochein ami*, againſt *Sir Richard Moore*, one of the maſters of the chancery, by bill in chancery, in treſpaſs of battery and falſe impriſonment. The defendant, *quoad* the battery, pleaded not guilty; *quoad* the impriſonment he juſtified, becauſe *his* father held of him ſuch lands by knight's ſervice, and died ſeiſed in his homage, for which he ſeized the plaintiff as his ward; and iſſue thereupon. After *mittimus* out of the chancery, theſe iſſues were delivered here to be tried; and now this Term a trial was at this bar, and the ſecond iſſue found for the plaintiff: and it was moved in arreſt of judgment,

Ante, 86. Co. Lit. 135. b. F. N. B. 27. Styles, 369. 2. Inſt. 390. 4. Co. 53. b. W. Jones, 177. Palm. 295. Prac. Reg. in Ch. 296.

FIRST, Becauſe the plaintiff ſued by *prochein ami*, where he ought to ſue by his *guardian*; and for proof thereof the Caſe betwixt *Jones and Sympſon* was cited.—*Sed non allocatur*; becauſe the plaintiff may ſue by *guardian* or *prochein ami*, but the defendant ſhall ſue only by guardian.

SECONDLY,

An infant shall not find pledges.

SECONDLY, Because there were not pledges found.—*Sed non allocatur*; because an infant shall not find pledges.

4. Inst. 180. 4. & 5. *Ann.* c. 8. Co. 61. b. Co. Lit. 127. 2. Leon. 185. Jones, 277. 26. & 27. *Cor.* 2. c. 8. 16. 2. Bac. Abr. 525, 526. 2. Hawk. P. C. 293.

A venue aided by the statute 21. *Jac.* 1. c. 13. Ante, 27. 5. Co. 36. Cro. Jac. 631.

THIRDLY, Because the battery and imprisonment are alledged to be at one place, and the land holden by knight's service at another place, and the *venire facias* was only from one of the said places.—*Sed non allocatur*; for it is now aided by the statute. Whereupon it was adjudged for the plaintiff.

CASE 3.

Kadwalader and Another *against* Bryan.

A prohibition does not lie on 23. *Hen.* 8. c. 9. where a cause is transmitted upon the request of an inferior judge to his immediate superior. Post. 339. Ante. 97. 2. Roll Abr. 287.

PROHIBITION by them two upon the 23. *Hen.* 8. c. 9. Because they being inhabitants in such a town, where such a prebend and his predecessors, time whereof, &c. had used to hold plea of ecclesiastical causes, the defendant sued them upon the statute before the ordinary in causes ecclesiastical concerning defamation. The defendant comes in and pleads, that the cause ecclesiastical being depending in the prebend's court, the inferior judge there requested the superior judge to assume it; and upon this bar it was demurred,

Proceedings in the ecclesiastical court may be summarily alledged.—Co. Carth. 32. 4.

THE FIRST REASON alledged was, For that it is not shewn that the cause was ecclesiastical, so as the Court might judge whether it were fit to be removed.

Lit. 303. Latw. 304. 5 Com. Dig. 78. Hob. 296. Show. 6. Cro. Jac. 351. Com. Dig. 496. Comp. 330.

On a cause being removed on request from *a peculiar*, it need not be shewn that the request was under *seal*. Post. 281.

SECONDLY, For that he did not shew that the request is under seal; and if it be not, it is not sufficient to remove the cause.

The 23. *Hen.* 8. c. 9. extends to suits out of a *peculiar* as well as out of a *diocese*. — 1. Roll Rep. 328. Skin. 233. 5. Mod. 238.

THIRDLY, For that it was in *a peculiar* to be removed before the ordinary, and so out of the statute, and no cause of prohibition:—but upon view of the statute it appears clearly, that it extends as well to suits of the peculiar jurisdiction as out of the diocese.

Cro. Jac. 321. Hob. 96. 101. 200 Hard. 421. 5 Mod. 451. Salk. 549. Cartl. 33. 477. Skin. 589.

And for the other exceptions, they were not allowed, because being of a cause ecclesiastical it needs not to shew the particular, as in other pleadings, but as generally pleaded, "*concurrentibus his* "*quæ in jure requiruntur.*" And for request, it is not requisite to have it shewn under seal; and if it ought, it shall be well intended by the pleading. In a feoffment there needs no livery to be alledged; nor in assignment of dower, that it was by metes and bounds needs not to be pleaded (a), for these necessary circumstances shall be intended; and therefore the bar was held good

Two cannot join in prohibition where the injury is several.

Also a prohibition brought by two cannot be good where the griefs be several. Whereupon consultation was awarded.

(a) See 5. Com. Dig. 73.

CASE 4.

Walker *against* Riches.

If an *elegit* omit the words "*et* "*medietatem* "*terrarum*," &c. the sheriff cannot deliver the moiety of the lands.—Dyer, 223. 1. Vent. 255.

AN ELEGIT issued after judgment; and the writ recited the judgment, *quod elegit executionem* of the goods and moiety of the land; and the writ was, "*Ideo tibi præcipimus, quod bona et ca-*

Co. Lit. 290. Cro. Jac. 653. 2. Vent. 171. Carth. 453. Dougl. 473.

"*talla*"

WALKER *againſt* RICHES.

"*talla*" of the defendant's, "*quæ habuit die judicii prædicti redditi, "deliberari facias*," omitting theſe words, "*et medietatem terrarum "et tenementorum prædictorum, tenendum*" the ſaid goods and moiety of the lands "*quouſque debitum leveter.*" By virtue hereof the ſheriff extended the lands and goods, and delivered the moiety of the land, and returned the inquiſition.

And it was now moved by CALTHROP, that this writ might be amended (for it is but a miſpriſion of the clerk), and that the extent might ſtand.

But IT WAS RULED, that it ſhall not be amended, and that he ought to have a new *elegit*, becauſe the inquiſition was taken without warrant, the ſheriff having no warrant to extend thoſe lands.

Topſall *againſt* Edwards.

CASE 5.

ACTION ON THE CASE FOR WORDS, for calling him "thief," and for procuring him to be indicted and *impriſoned* for felony, until he was acquitted. Upon not guilty pleaded, and found for the plaintiff, and ten ſhillings damages (ſo under forty ſhillings),

In an action for words, *and cauſing him to be impriſoned*, the plaintiff ſhall have *coſts*, though the damages be under 40s. Ante, 141. Poſt. 307.

It was moved upon the 21. *Jac.* 1. c. 16. (which appoints, that in action for *words*, where the damages are aſſeſſed under forty ſhillings, that he ſhall have no more coſts than damages), that he ſhould have but ten ſhillings for coſts.

But THE COURT conceived, foraſmuch as this was not an action for words only, but alſo an action upon the caſe in nature of a conſpiracy, and the defendant is found guilty of both, he ſhall have judgment for his ordinary coſts, and that it is out of the ſtatute.

3. Mod. 39. 2. Ven. 48. Raym. 487. Bull. N. P. 10, 11. Ter. Rep. 655.

Stra. 192. 645. 936. Ld. Raym. 1588. 2. Com. Dig. 546. Carth. 225. Dougl. 249. 1.

Trankerſley *againſt* Robinſon.

CASE 6.

ASSUMPSIT againſt an adminiſtrator upon a promiſe by the inteſtate; ſuppoſing, that the inteſtate borrowed of the plaintiff, upon the firſt day of *May*, 12. *Jac.* 1. twenty pounds, and in conſideration thereof promiſed to repay it him upon requeſt; and that the plaintiff, upon the firſt of *Auguſt*, 12. *Jac.* 1. requeſted the payment, and he had not paid it; and that the inteſtate died, and adminiſtration was committed to the defendant, who upon requeſt had not paid it, although he had aſſets. Upon *non aſſumpſit* pleaded, the verdict was found for the plaintiff.

A defendant cannot take advantage of the ſtatute of limitations upon the plaintiff's own ſhewing; but muſt *plead* it in bar, or *demur* to the declaration. Ante, 115. 160. Cro. Jac. 115. Lev. 111. Salk. 278. Carth. 137. 1 Com. Dig. 154. Cowp. 215.

WARD, *Serjeant*, moved in arreſt of judgment, that this *aſſumpſit* being made 12. *Jac.* 1. and the breach in the ſame year, this action is brought too long after; for by the 21. *Jac.* 1. c. 16. of Limitations, it ſhould be brought within ſix years.

JONES and WHITLOCK conceived the defendant ought not to have the advantage of this ſtatute, unleſs he had pleaded it, or had demurred thereupon, becauſe the ſtatute hath divers exceptions; ſo that if it be brought after the time, yet if the plaintiff were *an infant*, or *feme covert*, &c. it were well enough.

But HYDE, *Chief Juſtice*, and *I*, conceived, foraſmuch as it appeareth by the plaintiff's own ſhewing in his declaration, that it is out of the limitation of the ſtatute, and the ſtatute is in the negative,

Trankersley *againſt* Robinson.

tive, "that it ſhall *not* be brought at all," unleſs it be brought within the time limited by the ſtatute; therefore the defendant ſhall have advantage thereof by exception, without pleading. Whereupon the Court would further adviſe.

Case 7.

Fryer *againſt* Fawkenor.

Judgment may be reverſed for abſurd, prolix, and vitious pleadings, and the clerk fined for entering them on record.

See The King v. May, Dougl. 194.

ERROR of a judgment in *Shrewſbury*, in debt, upon an obligation of forty pounds conditioned to perform an award. The defendant demanded *oyer* of the bond and condition, and pleaded, *quòd nullum fecerunt arbitrium.* The plaintiff imparls, and afterward replies, and ſhews the award and breach. The defendant imparls, and after makes defence, and demands *oyer* of the bond and condition, and pleads the ſame plea as before. The plaintiff imparls, and after replies *verbatim* as before. The defendant thereupon demurs, and ſhews cauſes and reaſons that the award is ill, and long argument for the defendant. Then the plaintiff imparls, and after comes and ſhews divers cauſes and reaſons and book caſes, that this arbitrament was good; and all theſe were entered upon the record; and afterwards judgment was given for the plaintiff.—And for theſe *abſurdities* and *prolixities* in the pleading and defence IT WAS RESOLVED, that it was an erroneous and vitious proceeding. Whereupon the judgment was reverſed, and the clerk fined for making ſuch a record.

Case 8.

Dunſcomb *againſt* Smith.

The replication of *de injuriâ ſuâ propriâ* to a plea of *ſon aſſault* muſt conclude to *the country*, or it will be bad on *ſpecial demurrer.* Poſt. 317. Cro. Jac. 589. Co. Lit. 126. 1 Sid. 215. 2 Saund. 190. 337. Show. 70. Raym. 94. 98.

TRESPASS of aſſault, battery, and wounding. The defendant pleaded, that the plaintiff aſſaulted him, and would have beaten and wounded him, and what he did was in his own defence. The plaintiff replies, that an attachment iſſued out of the chancery to arreſt the defendant, and that by ſpecial warrant from the ſheriff he arreſted him, and laid hands upon him; and the defendant reſcued himſelf, and beat the plaintiff *de injuriâ ſuâ propriâ abſque tali cauſâ*; *et hoc paratus eſt verificare*; *unde*, &c. And upon this the defendant demurred generally, without ſhewing any cauſe. —And by ALL THE COURT the replication was held vitious, becauſe he did not conclude his plea, *et hoc petit quòd inquiratur per patriam*, but relied upon his plea. Whereupon it was adjudged for the defendant.

Lutw. 121. 2 Will. 150.

Case 9.

Adams *againſt* Hilks.

In an action of trover and converſion "at the "ward of *All* "*Saints* in "*Briſtol*," a *venire facias* "of *Briſtol*," without ſaying "the ward of "*All Saints*," is good. — Cro. Eliz. 260. 807. Cro. Jac. 222. 308. Cowp. 682.

ERROR upon a judgment in *Briſtol.* The error was aſſigned by GERMYN, Becauſe in an action of trover of 4000 lemons *apud Wardam de All Saints* in *Briſtol*, and converſion of them in the ſame pariſh, upon not guilty pleaded, the *venire facias* was "of *Briſtol*," where it ought to have been "of *the ward of All Saints* "in *Briſtol*," for that is the place of the converſion, which is the moſt certain; and compared it to *Arundell's Caſe*, 6. *Co.* 14. where a fact was ſuppoſed to be *in parochiâ Sanctæ Margaretæ in Weſtminſter*; and the *venire facias* being of *Weſtminſter*, it was ruled there

to

to be ill, and that it was not aided by the 21. *Jac.* 1. c. 13. for it is a miſ-trial by a wrong *viſne*.—But ALL THE COURT held, that the trial was good, and cannot be otherwiſe; for A WARD *in* A CITY is but as AN HUNDRED *in* A COUNTY, and thereof there never ſhall be any *viſne*. And it is not like to the caſe that was put, where an act is ſuppoſed to be done at ſuch *a pariſh* in ſuch *a ward* in *a city*; there the *viſne* ſhall be of the pariſh. *Vide* 7. *Hen.* 6. 38. 8. *Hen.* 5. 10. Whereupon rule was given, that judgment ſhould be affirmed unleſs other matter be ſhewn. And ſo it was done in the Caſe of *Adams v. Welling* upon a judgment in *Briſtol*, where the ſame exception was taken, and the judgment affirmed, unleſs, &c.

ADAMS *againſt* HILKS.

——— *againſt* Hopkins.

CASE 10.

EJECTMENT. The plaintiff declares upon a leaſe made by *Sir Archibald Douglas* and *Dame Eleanor his wife*, of a houſe and lands in *Engleſield*. Upon not guilty pleaded, it appeared upon the evidence, that the leaſe was ſealed and ſubſcribed by them both, and a letter of attorney made by them to deliver it upon the land.

In *ejectment*, a leaſe delivered upon the land by letter of attorney from huſband *and wife*, is good. Ante, 95. 3. Co. 35. b. Yelv. 1. 2. Brownl. 248. Cro. Jac. 563. 617. 2. Leon. 200. 1. Com. Dig. 561. 3. Bac. Abr. Dougl. 329.

FYNCH, *Serjeant*, and SHELDON, *the King's Solicitor*, thereupon ſtrongly urged, that a letter of attorney by a *feme covert* is merely void, and the leaſe is only the leaſe of the huſband; ſo the plaintiff hath failed.

But ALL THE COURT conceived, it was a good letter of attorney for both, and the leaſe well delivered: and it is the leaſe of them both during the huſband's life.

305, 306. Cowp. 201.

Hill *againſt* Thornton.

CASE 11.

PROHIBITION; the plaintiff therein ſurmiſing, That his father died ſeiſed of ſuch lands, which deſcended to him as heir, and that the defendant by libel in the ſpiritual court had ſuggeſted, that he made a will and deviſed thoſe lands to his executors to ſell, and thereby had bequeathed divers goods and portions of money, &c. and had made the defendant executor therein, who therefore ſued in the ſpiritual court to have probate thereof, *ubi revera* he did not make ſuch a will; and a will of lands ought not to be proved in the ſpiritual court. And thereupon the defendant appeared, and ſhewed for cauſe of conſultation, That the ſaid teſtator made ſuch a will, and made him executor; and he ſued them to prove the ſaid will: whereupon iſſue was joined, "Whether he made ſuch "a will?" After evidence the plaintiff was nonſuited.

A *conſultation* granted upon the plaintiff being nonſuited in *prohibition* on a queſtion, "Whether his father had deviſed *lands* to be ſold for the payment of legacies, and made bequeſts of divers *goods*?" for the bequeſt of goods is cauſe eccleſiaſtic. Ante, 94. 113. 115. Poſt. 392. 396. Hobart, 192. Cro. Jac. 346. 576. 4. Com. Dig. 521. Cowp. 424. 2. Term Rep. 473.

GODBOLT, *for the plaintiff*, now moved, that although the plaintiff be nonſuited, yet it doth not appear that the defendant hath cauſe to have conſultation; for it is not ſhewn that the teſtator had goods, &c. and then he hath no cauſe to have probate, for a will of lands needs not be proved; but of goods there ought to be a probate, otherwiſe he cannot have any action. As if a libel were for tithes to be paid for trees which were not *ſylvæ cæduæ*, although the iſſue be upon a collateral point, and found for the defendant, yet he ſhall not have conſultation; ſo if there be a ſuit for laying

HILL *against* THORNTON.

violent hands upon a clerk; and to have damages beſides correction, in this caſe no conſultation ſhall be granted, becauſe he hath no ſuch cauſe of ſuit in the eccleſiaſtical court.

And ALL THE COURT agreed to thoſe Caſes; for it appears there, that there was not any cauſe of eccleſiaſtical ſuit; but here in this Caſe it appears that he hath cauſe of ſuit to prove the will for *the goods*, for otherwiſe he cannot maintain any action: whereupon conſultation was granted, that he might proceed *quoad bona*. —Obſerve well this Caſe, and the cauſe and reaſon why a conſultation was granted, together with the difference between this and *Den's Caſe* (*a*).

(*a*) Ante, p. 114, 115.

CASE 12.

Benſon and his Wife *againſt* Flower and Blackwells.

Qu. Whether damages and coſts recovered in an action for *words*, and levied by the ſheriff, can be aſſigned by commiſſioners on the plaintiff's becoming bankrupt before the return of the writ? Poſt. 176.

ACTION ON THE CASE for words ſpoken of the wife. Upon not guilty pleaded, and a verdict for the plaintiff, and five pounds damages aſſeſſed, and ſeven pounds for coſts, they ſue out execution, and after the money was levied by the ſheriff, and before the return of the writ, the plaintiff became a bankrupt, and by the commiſſioners of bankrupts the ſaid twelve pounds ſo recovered were aſſigned by the name of the money of *Benſon* to *Blackwell* and other creditors. The ſheriff brings the money into court. The plaintiff who recovered prayed to have the money delivered to him out of court; and the ſaid *Blackwell* and the creditors pray that the money may be delivered to them, according to the ſale and aſſignment of the commiſſioners.

And, Whether it ſhould be delivered to them? was the queſtion.

S. C. Jones, 215. Cowp. 25. Cook's B. L. 406. 1. Com. Dig. 520. Dougl. 584. note (1). 3. Term Rep. 435.

HYDE, *Chief Juſtice*, and JONES, conceived, that the ſale and aſſignment were good, and that the money ſhould be delivered to them; for the damages being recovered, and the coſts aſſeſſed by the judgment, it is a debt, and an action of debt well lies upon this judgment; and the money being levied is properly appertaining to him, and therefore in the power of the commiſſioners to diſpoſe thereof: and as it may be forfeited to the king by outlawry, or aſſigned unto the king, and he may cauſe it to be levied, ſo may the creditors upon this commiſſion.

But WHITLOCK and MYSELF were of another opinion, becauſe it being recovered and execution awarded, and the ſheriff levying the money before he became a bankrupt, it is, as it were, *in cuſtodiâ legis*, and the creditors cannot give a diſcharge, nor are they parties in court who can acknowledge ſatisfaction; and if the judgment be reverſed, they are not compellable to make reſtitution. —Whereupon THE COURT would further adviſe (*b*).

(*b*) It was moved again this Term, and adjudged, that this money was not aſſignable by the commiſſioners.—Poſt. 176.

Snape

Snape *againſt* Norgate.

CASE 13.

SCIRE FACIAS; ſuppoſing, That he recovered in debt againſt an executor, and had judgment for forty pounds, and ſeven pounds for coſts, *de bonis teſtatoris, ſi tantum*; and if not, then *de bonis propriis*; and that before ſatisfaction he died inteſtate; and adminiſtration was committed to the defendant *de bonis primi teſtatoris*, and alſo of the executors; and that the executor had not ſatisfied; and therefore he ſued this writ, to ſhew cauſe wherefore he ſhould not have execution. The defendant pleaded *plene adminiſtravit* of the goods of the firſt teſtator; and iſſue thereupon, and found for the plaintiff, that he had ASSETS.

On a judgment againſt an executor for the teſtator's debt, if the executor die, a *ſcire facias* may be ſued againſt his adminiſtrator as adminiſtrator of the firſt teſtator, but not as adminiſtrator to the executor. Poſt. 227.

REEVES now moved in arreſt of judgment, that this *ſcire facias* is not well grounded; for the recovery being againſt an executor of a debt by the teſtator, and he dying inteſtate, the ſuit is determined, and he ought to commence *de novo*: as if an executor recover a debt of the teſtator's, the adminiſtrator ſhall not have a *ſcire facias* upon this judgment; ſo *è converſo*, &c.

Jones, 214. 1. Roll. Ab. 890. Cro. Jac. 4. Yelv. 33. Latch. 40. Palm. 443. 5. Co. 9. b. And. 23. Moor, 40. 2. Saund. 149.

HYDE, *Chief Juſtice*, doubted; but JONES, WHITLOCK, and MYSELF, conceived, that the *ſcire facias* was well awarded. For true it is, that as adminiſtrator he cannot have a *ſcire facias* upon a judgment by the executor, but is put to a new action (*a*); for he comes *paramount* the judgment, and is not party thereto: yet where a judgment is againſt an executor for the teſtator's debt, although he die inteſtate; this judgment might be executed by a *ſcire facias* againſt the adminiſtrator of the firſt teſtator, who cometh in place of the executor, and being for the debt of the teſtator, is liable thereto; but as adminiſtrator to the executor, he is not liable.

THE SECOND EXCEPTION was, Becauſe in the firſt action of debt, whereupon the recovery was againſt the executor, the action being for forty pounds upon bond, he pleaded *plene adminiſtravit*, and *aſſets* found to twenty pounds; and the judgment is given againſt him for forty pounds, whereas it ought to have been but for twenty pounds only: and now in the *ſcire facias* upon this judgment *aſſets* is found to forty pounds; which ought not ſo to have been, but for the twenty pounds, which is found to be *aſſets* in his hands; and the *ſcire facias* ought to have been only for that twenty pounds.

On *plene adminiſtravit*, the plaintiff ſhall have judgment for the entire debt, though aſſets to a leſs amount be found. Poſt. 372.

8. Co. 134. a. 2. Sid. 122. 1. Roll. Ab. 929. Cro. Eliz. 318. 592. Moor, 246. 5. Com. Dig. 206. Cowp. 290. 293.

But THE COURT conceived, although *aſſets* to twenty pounds only be found, yet judgment for the entire debt is good: and the *ſcire facias* being to have execution of forty pounds, and being therein found he had *aſſets* to forty pounds, it may well be conceived that he had more *aſſets* after the firſt verdict and judgment. Whereupon the plaintiff here had judgment according to that verdict.

Vide the caſe of Harriſon & Beecles, 3. Term Rep. 688.

(*a*) But now by 17. Car. 2. c. 8. an adminiſtrator *de bonis non* may have *ſcire facias* on a judgment by or in the name of any executor or adminiſtrator. Salk. 322. Ld. Raym. 1072. 6. Mod. 290. 11. Mod. 34. 2. Vern. 237.

CASE 14.

Chambers's Caſe.

Ante, 133.

A priſoner committed *in execution* by one court of juſtice cannot be bailed by another. Poſt. 507. 579. 4. Inſt. 47. 62. 12. Rep. 83. Vaugh. 135. Dyer, 59. 1. Mod. 144. Ld. Raym. 938. 1105. 1. Burr. 460. 1. Wilſ. 299. 11. St. Tr. 317. 2. Bl. Rep. 765. 3. Wilſ. 188. 2. Hawk. P. C. ch. 15. ſ. 73. 77. 3. Com. Dig. 456. *Vide* the caſe of Periſt & Addington, Trinity Term, 31. Geo. 3. in the king's bench.

CHAMBERS was brought by a *habeas corpus* out of THE FLEET, and returned, that he was "committed to the *Fleet* by virtue "of a decree in THE STAR CHAMBER, by reaſon of *certain words* "he uſed at the council table, *viz.* That the merchants of *England* "were ſcrewed up here in *England* more than in *Turkey*." And for theſe and other words of defamation of the government, he was cenſured to be committed to the *Fleet*, and to be there impriſoned until he made his ſubmiſſion at the council table, and to pay a fine of two thouſand pounds.

And now at the bar he prayed to be delivered, becauſe this ſentence is not warranted by any law or ſtatute; for the ſtatute of 3. *Hen.* 7. c. 1. which is the foundation of the court of ſtar chamber, doth not give them any authority to puniſh for *words* only.

But ALL THE COURT informed him, that the court of ſtar chamber was not erected by the 3. *Hen.* 7. c. 1. but was a court many years before, and one of the moſt high and honourable courts of juſtice; and to deliver one who was committed by the decree of one of the courts of juſtice, was not the uſage of this court. And therefore he was remanded. *Vide* 3. *Aſſ. pl.* 38. 28. *Aſſ. pl.* 34. 21. *Hen.* 8. c. 20.

CASE 15.

Gennings *againſt* Lake.

Hilary Term, 3. *Car.* 1. *Roll* 612.

A grant from the crown of "all thoſe meſſuages called "*Drocomb*, and "all lands to the "ſaid meſſuage "belonging, or "with them demiſed, lately "belonging to "the priory of "*A.*" is good, although at the time the poſſeſſion of the priory was ſurrendered to the Crown, and the eſtate granted was only known by the name of "the "four cloſes in "*Drocomb*," and the land was not built upon when ſurrendered. *Ante*, 57. 3. Keb. 44. Dig. 443. 1. Burr. 636. Cowp. 9. 620.

EJECTMENT. Upon not guilty pleaded, a ſpecial verdict was found, that the prior of *Launceſton* was ſeiſed in fee of the tenements within mentioned, which then were "four cloſes in *North* "*Drocomb*, in *Launceſton*;" and upon the 28th *September*, 27. *Hen.* 8. demiſed them to *John Peres* by the name of "the four cloſes in *Dro*- "*comb*, within the boroughof *Launceſton*, HABENDUM for ninety-nine "years, rendering twelve pounds *per annum*." Afterwards, in the 30. *Hen.* 8. by indenture inrolled, the ſaid prior and convent ſurrendered all their poſſeſſions to king *Henry* the eighth, who died ſeiſed, and by mean deſcents it came to queen *Elizabeth*, who, in the four-and-twentieth year of her reign, by her letters patents, granted to *Edward Froſt* and *John Walker*, and their heirs, *totum illud meſſuagium et tenementum vocat.* DROCOMBS, *alias* DROTONS, *ac omnia terras, tenementa, dicto meſſuagio ſpectant. vel cum eodem dimiſſa, ſituat. jacent. et exiſtent. in* LAUNCESTON, *in comitat.* CORNUBIÆ, *ac nuper prioratui de* LAUNCESTON *ſpectantia*; and that theſe lands by mean conveyances were come to the leſſor of the plaintiff; and that before the leaſes aforeſaid, *viz.* in 21. *Eliz.* an houſe was erected upon a rood of land of the ſaid cloſes by the occupiers thereof, *et quod tenementum in narratione prædictâ mentionatum eodem meſſuagio ſpectabat et pertinebat*, and was deviſed and granted with the ſaid meſſuage, and was always called and known as well by the name of *Drocomb* as by the name of *North Drocomb*; and that the ſaid tenements at the time of the diſſolution were parcel of the poſſeſſions of the ſaid priory; Cro. Jac. 526. 3. Lev. 165. Plowd. 170. Moor, 682. 2. Roll. Rep. 151. 3. Com.

and

and that the ſaid prior had not other lands in *Launceſton* known by the name of *Drocomb*, or *North Drocomb*, there, beſides the lands in the declaration; and that king *James*, in the eighth year of his reign, demiſed thoſe lands to *John Eldred* for threeſcore years, by the name of the four cloſes late in the tenure of *John Peres* in *North Drocomb*, under whom the defendant claims. GENNINGS *againſt* LAKE.

And thereupon theſe queſtions were moved:

FIRST, Whether (the leaſe being made by the name of the four cloſes in *North Drocomb*, there being no other name known when it came to king *Henry* the eighth) the patent of the 24. *Eliz.* by another name may be good, for that the queen was not well informed?

SECONDLY, The patent being made of a meſſuage and lands thereto appertaining, and this meſſuage newly erected after the firſt year of queen *Elizabeth* (for then all the reverſion of the ſaid four cloſes is found by the verdict to come to the queen), Whether the lands ſhall paſs? For although land in the caſe of a common perſon may paſs by the name of lands appertaining to a houſe, as it is in *Hill v Grange* (*a*), yet it cannot be ſo in caſe of the queen; and if it might be, yet it ought to be for a longer time than twenty years to be ſo demiſed and occupied, if you would have it to obtain a reputation of paſſing by the word *pertaining*.

A grant from *the Crown* of a houſe *cum pertinentiis* will paſs land that was occupied with the houſe.

1. Co. 43.
10. Co. 67.
2. Roll. Ab. 199.
3. Com. Dig. 447.
Cowp. 808.
1. Burr. 626.

But ALL THE COURT conceived, that the patent is good for the meſſuage and all the land, notwithſtanding theſe exceptions: for although the land was not built upon when it was demiſed, and when it came to the king, and that afterwards a meſſuage was erected thereupon, or it were afterwards converted into another nature before the patent, yet it ſhall be granted as it is, and by ſuch name as it is known at the time of the patent; and although it varies from the firſt name in the leaſe, yet being found to be all one, it paſſeth well by the patent.

Poſt. 308.
Ante, 17. 57.

ALSO they conceived, that land may be ſaid to be appertaining to an houſe, as well in the king's caſe as of a common perſon, where it hath been let and occupied together by a convenient time. *Vide Co. Ent.* 384. *Dyer*, 362.—And afterwards it was adjudged for the plaintiff.

(*a*) Pl. Com. 170. b.

Edgar and Webb *againſt* Sorrell.

CASE 16.

TRESPASS by *original* for divers loads of wheat. The defendant juſtifies, for that THE DEAN AND CHAPTER *ſanctæ et individuæ Trinitatis in* NORWICH, *ex fundatione regis* EDVARDI SEXTI, were ſeiſed in fee of the rectory of *Henley*, in the county of *Suffolk*, wherein the ſaid loads of corn were growing, and ſevered from their nine parts, which he took by their commands; and ſo juſtifies, and gives *colour* to the plaintiffs.

In treſpaſs for taking a load of wheat, if the defendant juſtify for tithes under a feoffment from the dean and chapter of the rectory, it ſhall be intended there was glebe land appertaining thereto, whereof a feoffment might be made.
10. Co. 90.
3. Co. 75. a.

The plaintiffs reply, that the ſaid dean and chapter were ſeiſed in fee, and that one *Thomas* —— was dean, and he and the chapter by indenture, by the name of *Thomas* ——, *decanus ſanctæ et individuæ Trinitatis, &c.* (omitting the words *ex fundatione regis* EDVARDI SEXTI) and the chapter demiſed that rectory to *Thomas*

EDGAR and WEBB *againſt* SORRELL.

Gooch the 9. *Eliz.* for ninety-nine years, and from him conveys it by mean aſſignment to *Richard Mapleſden*, and from him to the plaintiffs; and that they were poſſeſſed, &c. until the defendant took the ſaid tithes.

The defendant by rejoinder *confeſſes* the leaſe, and all the aſſignments, except the aſſignment by *Richard Mapleſden*, and that he, before the pretended aſſignment, viz. 22. *Jac.* 1. by feoffment conveyed the ſaid rectory to one *William Wilſton*, for which cauſe the dean and chapter entered into the ſaid rectory as a forfeiture; and the corn being ſevered from the nine parts, and ſet out for tithes, he took them by the command of the ſaid dean and chapter, and TRAVERSES the laſt grant of the term by *Richard Mapleſden*.

The plaintiffs thereupon demurred.

Ante, 101. 162. Co. Lit. 303. b. Cro. Jac. 411.

GERMYN, *for the plaintiffs*, now ſhewed his reaſons: FIRST, Becauſe the defendant, in the rejoinder, pleaded a feoffment of the rectory, and doth not ſhew that any glebe was appertaining thereto whereof he might make a feoffment.—*Sed non allocatur*; for it ſhall be intended a good feoffment, and that there was glebe land thereto appertaining. *Vide* 15. *Hen.* 7. 1. 16. *Hen.* 7. 1.

Dougl, 633.

In pleading an act done by a corporation, as entering for a forfeiture, a deed to enter need not be ſhewn. Cro. Jac 411. 2. Saund. 305. 5. Com. Dig. 197.

THE SECOND EXCEPTION was, Becauſe he pleaded an entry after the forfeiture, and ſhews not a deed of command to enter.—*Sed non allocatur*: for it is not pleaded that any entered by their command after the forfeiture, but that the dean and chapter themſelves entered, which ſhall be intended a ſufficient entry; and all neceſſary circumſtances ſhall be implied. Alſo the feoffment is not only *a forfeiture*, but *a diſſeiſin*, being by tenant for years, and then every one may enter on their behalf, where they have right of entry. 11. *Aſſ.* 2.

In pleading a leaſe by dean and chapter, the omiſſion of *part* of their *corporate name*, is fatal.

THE THIRD EXCEPTION was taken to the replication: For this leaſe is pleaded to be made by the dean and chapter, omitting part of their name, and for this cauſe was merely void; and ſo the plaintiffs had not any title. Wherefore it was adjudged for the defendant.

CASE 17.

Sir John Bodwell *againſt* John Bodwell.

Michaelmas Term, 2. *Car.* 1. *Roll* 457.

In a bill of ANNUITY for an annual rent granted for life, a declaration that the grantee *virtute cujus ſeiſitus fuit in dominico ſuo ut de libero tenemento*, is good.

ERROR of a judgment at the grand ſeſſions at *Caernarvon*, in AN ANNUITY by bill for two hundred and twenty pounds, arrears of an annuity granted of twenty pounds, *quas ei debet*; and counts, That the defendant, *Sir John Bodwell*, upon the 4th *November*, 4. *Jac.* 1. by a deed ſhewn, had granted to the plaintiff, *John Bodwell*, the ſaid annual rent, by the name of an annuity or annual rent of twenty pounds, HABENDUM to him for his life, by virtue whereof he was ſeiſed *in dominico ſuo ut de libero tenemento*; and for eleven years behind at ſuch a Feaſt, he brings the action.

S. C. Jones. 217. Co. Ent. 49. 2. Bulſt. 148. Cath. 355. Dougl 455.

The defendant, *Sir John Bodwell*, demands *oyer* of the deed; which being entered and read, it thereby appeared, that it was a rent iſſuing out of a certain parſonage in the ſaid county, with a clauſe of diſtreſs upon the rectory or church of *Kenthkelley*, and divers other the rectories in the ſaid county there mentioned: and pleaded, that the ſaid *John Bodwell* granted the ſaid rectory with the

the church of *Kenthkelley* to him and his heirs; whereupon he entered therein, and ſo pleaded it as *an extinguiſhment*, &c. BODWELL *againſt* BODWELL.

The plaintiff *John Bodwell* replies, that there was nothing granted thereby which was pertaining to the ſaid church.

The defendant *Sir John Bodwell* rejoins, that ſuch a piece of land was parcel of the ſaid rectory and church.

Thereupon they were at iſſue; and it was found for the plaintiff *John Bodwell*, and judgment given for him.

And now error was brought by *Sir John Bodwell*, and ſeveral errors aſſigned upon the record; to which *John Bodwell* pleaded *in nullo eſt erratum*, and all were over-ruled: and now *ore tenus* he inſiſted upon other errors.

FIRST, That he declaring upon an annuity, or annual rent granted for life *virtute cujus fuit ſeiſitus in dominico ſuo ut de libero tenemento*, proves, that it is no *annuity*, but *a rent-charge*, and that he made it his election to have it as a rent-charge; and in proof thereof was cited *Dyer*, 61. & 220.—*Sed non allocatur*; for being an annuity granted for life, although it is no rent-charge, yet he may plead *ſeiſitus in dominico ſuo ut de libero tenemento*: and although ſuch exception were taken by BENDLOSSE, in 3. *Edw.* 6. who cited that caſe, yet the Court notwithſtanding reſolved for the plaintiff. And LORD COKE (*a*) hath two ſeveral declarations in this manner; and yet the plaintiff had judgment.

(*a*) Coke's Entries, 49.

The SECOND ERROR aſſigned *ore tenus* was, That this bill of annuity is not maintainable, but he ought to have brought an original writ: for the ſtatute of 34. & 35. *Hen.* 8. c. 16. doth appoint, that in *Wales* actions real and mixt ſhall be ſued by *original writ*, and not *by bill*; but actions perſonal may be there ſued by bill: and that this is an action mixt, he relied upon 2. *Hen.* 4. *pl.* 13. and *Fitzherb.* "*Rent*," 48. Releaſe of actions real is a good bar in this, ſo releaſe of actions perſonal; and this being a franktenement, is rather real than perſonal. And *Co. Lit.* 285. affirms, that it is a mixt action.—But ALL THE COURT conceived, an annuity brought by bill there is well brought; for being an annuity which charges the perſon who grants it, though with a clauſe of diſtreſs, not being granted by him for himſelf and his heirs until election made, and a diſtreſs taken, is merely perſonal. *Vide* 2. *Edw.* 4. 84. *Long Quinto Edw.* 3. 40.; and therefore a releaſe of actions perſonal is clearly a bar.

An action for an annuity ſecured on a real eſtate, with a clauſe of diſtreſs on non-payment, may be brought in *Wales* by *bill*, as well as by *original*; for it is a charge on *the perſon* of the grantor.

W. Jones, 215. 5. Co. 48. 1. Com. Dig. 105. Co. Lit. 285. a. note (1).

NOY, *for the defendant*, in the writ of error, alſo moved, that this being not aſſigned for error, the plaintiff ſhould not have advantage thereof: for the ſtatute refers, "that ſuits ſhall be as in *North* "*Wales*;" and clearly in *North Wales* the cuſtom was to ſue by bill or plaint: and if he had aſſigned that for error, the defendant here might have maintained it by the cuſtom of *North Wales*; as in the Year-Book 36. *Edw.* 1. error was aſſigned of a judgment in *Wales* in a *quod ei deforceat*, in nature of a diſſeiſin, and in *Wales* the ſeiſin is alledged *poſt ultimam pacem proclamatam*; whereas in *England* it is *poſt primam tranſfretationem*; and it was maintained by cuſtom of *North Wales*. In *Hilary Term*, 6. *Edw.* 3. *Roll* 28. in this court,

R. 279. *Vide* 18. *Edw.* 2. Aſſiſe, 354. 30. *Edw.* 3. pl. 19.

BODWELL *against* BODWELL.

error was assigned, Because they held plea of lands in *North Wales*, where the land was held of the king *in capite*; and for that cause it was reversed, and the reason entered upon the roll; so it appears they have jurisdiction to hold plea of lands not held of the king, and that jurisdiction by the statute is in the affirmative; as it is held 11. *Co.* 64. *Dr. Foster's Case*, and 33. *Hen.* 8. *Dyer*, 50. and a statute in the affirmative doth not take away a former statute. but they stand together.—But THE COURT did not rely on this point, because for the former reasons they all held, that this judgment was good enough. And the judgment was affirmed.

Cro. Jac. 481.

CASE 18.

Grosse *against* Gayer.

Hilary Term, 1. *Car.* 1. *Roll* 828.

Qu. If the forfeiture upon attainder of *præmunire* relates to the offence, or to the judgment?

EJECTMENT. Upon a special verdict the case was, *Tregose* was indicted for a PRÆMUNIRE, upon a statute of 13 *Eliz.* c. 2. s. 7. and afterwards made a gift in tail of that land, and was after attainted by verdict, and had judgment for the said offence. And it was afterwards found by inquisition, upon a commission out of the exchequer, that *Tregose* was seised in fee of those lands at the time of the offence committed, and that the queen by patent granted those lands to *Sir George Cary*, under whom the plaintiff claims, and the defendant under the title of the tenant in tail. And if, &c.

W. Jones, 217. Co. Lit. 129. 391. 3. Inst. 126. 218. 2. Lev. 169. 3. Com. Dig. 385. 2. Bac. Abr. 582. 1. Hawk. P. C. 85. 2. Hawk. P. C. 644. 2. Wilf. 219. Hargrave's Co. Lit. 13. b. Dougl. 545.

The principal point argued was, Whether an attainder in a PRÆMUNIRE shall have relation to the *offence* for the forfeiture of his lands, or only to the time of the *judgment*?

SECONDLY, Admitting that this forfeiture shall relate to the offence, Whether this patent after the inquisition, by commission under the exchequer seal (no office being found by commission under the great seal), be good by the statute of 18. *Eliz.* c. 2. which makes patents upon valuable consideration good, notwithstanding there be not any inquisition found by the commission under THE GREAT SEAL?

And *quoad* the first point, THE JUSTICES did not resolve, being a case of difficulty.

If the king claim upon a forfeiture, his title must be found by office, on an inquisition under THE GREAT SEAL.

Co. Lit. 13. 390. 5. Co. 56. b. 5. Co. 52. Ante, 100. 2. Co. 16. 2. Roll. Ab. 183. Moor, 476. 11. Co. 4. a. Cro. Eliz. 851. 4. Com. Dig. 373. Cowp. 102. Dougl. 547.

But for the second THEY ALL RESOLVED, that by this judgment, "he should forfeit, &c.;" that, in that case, nothing vested in the king until office found (*a*): and it ought to be an office by commission under THE GREAT SEAL; for the franktenement being in the party offending (and, as this case is, in a stranger by the gift in tail) at the time of the attainder, it shall not be divested from him, and *in* the king without office by commission under the great seal, which is only an office to entitle the king, and not by inquisition, by virtue of a commission under the exchequer seal, which is but for instruction or information to the king, and for his officers to put the lands holden of the king in charge (*b*). But here the lands are not come unto the king until the office found. Therefore for this point only it was adjudged for the defendant. And this is out of the statute of 18. *Eliz.* c. 2. *Vide* 1. *Co.* 42. 3. *Rep.* 10. 5. *Rep.* 52. *Plowd.* 486. *Dyer*, 325. 29. *Hen.* 8. "*Charter de Pardon*," 52. 27. *Hen.* 8. "*Office devant Escheator*," 17.

(*a*) 2. Vez. 555. 3. Vez. 269. 4. Co. 58. 9. Co. 95. (*b*) 4. Com. Dig. 393.

The

The Earl of Pembroke *againſt* Boſtock and Green.

CASE 19.

QUARE IMPEDIT for the church of *Mottesſent*; wherein he counts, That queen *Elizabeth* was ſeiſed in fee of the advowſon of the ſaid church as in groſs, and preſented *Mr. Pinder*, who was admitted, inſtituted, and inducted; and that afterwards ſhe granted the advowſon in fee to *Sir Chriſtopher Hatton*, who by his deed granted to *Sir Walter Sands*, *knight*, who died ſeiſed, which deſcended to *Sir William Sands* his ſon and heir, who, in 12. *Jac.* 1. granted the next avoidance to *Henry earl of Danby*, who granted it to the plaintiff; and he, for the diſturbance, brings this action. The defendant *Green* pleaded, "*quod prædictus* WILLIELMUS SANDS "*non conceſſit*," and iſſue thereupon. And *Boſtock* pleaded and confeſſed queen *Elizabeth*'s title, and that, before ſhe had preſented *Mr. Pinder*, ſhe preſented *Richard Donnel*, who was admitted, inſtituted, and inducted; and that afterwards the queen preſented *Mr. Pinder* (the church being full of the ſaid *Richard Donnel*), who was admitted, inſtituted, and inducted; and that afterwards the ſaid queen *Elizabeth* granted unto *Sir Chriſtopher Hatton*, &c. as in the declaration, and that he conveyed it to *Sir Walter Sands*, who, 8. *Jac.* 1. let the ſaid advowſon to *John Moore*, ſerjeant at law, for one-and-twenty years, who granted it to *Green* the defendant, and that the church became void by the death of *Richard Donnel*; whereupon he preſented the defendant *Mr. Boſtock* to it; and traverſeth, that the church was void at the time of the inſtitution of the ſaid *Pinder*; and iſſue thereupon, and found for the plaintiff for that ſecond iſſue. And upon the firſt iſſue a ſpecial verdict was found, that at the time of the grant by *William Sands* he was *eſquire* only, and not *knighted*: and upon that alſo judgment was given for the plaintiff. And upon this judgment error was brought.

Pleadings in *quare impedit.*

S. C. Godb. 439. S. C. Jones, 215. Dyer, 299. Lit. Rep. 181.

The FIRST ERROR aſſigned was, Becauſe he counts of a grant by *William Sands*, *knight*, and it was found he was not knight; and ſo it being a void grant by that name, and the declaration untrue, judgment therefore ought to have been for the defendant.—But ALL THE COURT conceived, although it is found that he was not knight at the time of the grant, yet it is not material: for the iſſue being, Whether *William Sands* granted, &c. (*a*), that finding is idle and ſuperfluous, and is not material; but peradventure if the iſſue had been upon that grant to *Walter Sands*, *knight*, and the matter had been found, it had been material; as it is in *Dyer*, 300. where the iſſue was, Whether SIR THOMAS DE LA WARR, *Miles*, LORD DE LA WARR *conceſſit?* And it was found, that he made that grant in the life of his father, ſo as he was not then *Lord de la Warr*, nor *knight*, which was againſt him that pleaded it. But here the iſſue is upon the grant by *William Sands*, and whether it appears that he was a knight at the time of the grant or not, is not conſiderable; for the grant is good enough, and he had good title to grant, *Vide* 4. *Hen.* 6. 1. by ROLFE;

A declaration in *quare impedit* that the king granted the advowſon in fee to *A. B.* who granted it to *C. D. knight*, &c.; a verdict finding that *C. D.* was an *eſquire*, and not a *knight*, is immaterial, and ſhall be rejected as ſurpluſage. Ante, 76. 131. Co. Lit. 227. Cro. Jac. 240. Hob. 54. 2. Roll. Ab. 695. 1. Leon. 92. Ld. Ray. 859.

Moor, 431. Cro. Eliz. 480. 2. Saund. 308. Savil. 112. Hutton, 41. 2. Inſt. 594. 1. Bl. Com. 403. 1. Term Rep. 240.

(*a*) But ſee The King *v.* The Biſhop of Cheſter, 1. Ld. Raym. 305. where the Court held, that this point of the caſe was miſtaken, for that the iſſue was not upon the grant to *William Sands*, but upon the grant of the next avoidance.—See alſo S. C. Lit. Rep. 181. 197. 223. Sir W. Jones, 215. and Dyer, 299. b. pl. 35. Shower's Caſ. in Parl. 212.

PEMBROKE *againſt* BOSTOCK and GREEN.

21. *Edw.* 4. 71. & 72. 38. *Hen.* 6. 38. 7. *Hen.* 4. 7. 20. *Hen.* 6. *Bro.* 100. where it ſhall be by an *innuendo*, and the grant ſhall not be hurt thereby; and when it is admitted in pleading, the finding of the jury ſhall not prejudice.

Matter pleaded only as *inducement* need not be anſwered. Ante, 105. Poſt. 586. 2. Term Rep. 439. 3. Term Rep. 292. 4. Term Rep. 57.

THE SECOND ERROR aſſigned was, That the defendant *Boſtock*, in his pleading, pleaded a precedent leaſe for years to *John Moore* before the grant by him, under whom the plaintiff claims, which is good title for the defendant, and deſtroys the plaintiff's title, if it be true, which the plaintiff doth not expreſly deny, but by his proteſtation; ſo it is not denied by the plaintiff; and therefore for this cauſe the plaintiff ought not to recover; and judgment ought not to be given for him, but for the defendant: and in proof hereof were cited 7. *Edw.* 4. 20. *Dyer*, 119. 12. *Edw.* 4. 7. 9. *Hen.* 6. 26. 10. *Edw.* 4. 9.—*Sed non allocatur*; for although it had been a good plea, and would have deſtroyed the plaintiff's title, if the defendant had relied thereupon, and the plaintiff ought to have anſwered it, yet when it is pleaded by way of inducement only to the traverſe, and he traverſeth other matter in the count, the not anſwering or making proteſtation thereto by the plaintiff is not material; and the iſſue being joined upon the avoidance, and that being found, and not denied by the plaintiff, is not material; for the traverſe waits upon the matter precedent. 6. *Co.* 24. *Read's Caſe*, *Long Quinto Edw.* 3. 9. 3. *Edw.* 3. 17. Whereupon the judgment was affirmed.

Ante, 145. p. 401. Cro. Jac. 636. 2. Stra. 925. Dougl. 752. *in notis*. 2. Term Rep. 78.

And THE COURT aſſeſſed the damages to fourſcore pounds, although the value was found in the verdict to be an hundred pounds *per annum*; yet becauſe the defendant in the writ of error had obtained a writ to the biſhop, and his clerk was admitted, inſtituted, and had gotten the poſſeſſion, until he was removed by a writ of reſtitution, which was half a year and more, THE COURT would give but ſixty pounds for damages, and twenty pounds for coſts.

CASE 20.

——— *againſt* Heylers.

On a verdict for the defendant in aſſault and battery, if the judge certify that he acted as a conſtable in the execution of his office, he ſhall have double coſts, though the declaration be erroneous. 2. Inſt. 236. Ante, 90. Poſt. 286. 545. 553. Hob. 219. 284. Cro. Jac. 159. 251. Dyer, 32. b. Vaugh. 213. Noy, 32.

TRESPASS by huſband and wife for battery done to them both *ad damnum ipſorum*.

The defendant pleaded not guilty; and it was found for him, and certified, that he did it as conſtable in execution of his office; and double coſts were prayed, according to the ſtatute of 7. *Jac.* 1. c. 5.

But HENDEN, *Serjeant*, moved, that the declaration was ill, becauſe huſband and wife cannot join in battery done to them both, as it is 9. *Edw.* 4. and therefore judgment ought to have been given againſt the plaintiff upon the declaration, and not upon the verdict; and ſo no coſts ought to have been given.

But ALL THE COURT conceived, becauſe the defendant is found "not guilty," and what he did was as officer, and the ſtatute gives him double coſts for his vexation, which vexation appears, the plaintiffs ſhall not take advantage of the inſufficiency of the declaration and writ to excuſe themſelves of coſts.

1. Mod. 184. 1. Wilſ. 319. 1. Burr. 602. 2. Burr. 1162. 2. Hawk. P. C. 61. 2. Com. Dig. 549. Sayer's Coſts, 129. Dougl. 303, and 30^n. note (82). And ſee 21. *Jac.* 1. c. 12. and 21. *Geo.* 2. c. 44.

Jeffes

Jeffes' Caſe.

Case 21.

JEFFES was indicted, For that he exhibited an infamous libel, directed to the king, againſt SIR EDWARD COKE, late Chief Juſtice of the king's bench, and againſt the ſaid Court, for a judgment given in the ſaid court in the *Caſe of Magdalen College*, affirming the ſaid judgment to be treaſon, and calling him therein "traitor, perjured judge," and ſcandalizing all the profeſſors of the law, and containing much other ſcandalous matter; and fixed this libel upon the great gate at the entrance of *Weſtminſter-hall*, and in divers other public places.

A libel on a perſon who had been a judge, charging him with perjury during the time he was in office, is an indictable offence. Poſt. 504. 2. Term Rep. 473.

And being hereupon arraigned, he prayed that counſel might be aſſigned him; which was granted, and he had them, but would not be ruled to plead as they adviſed; but put in a ſcandalous plea, and inſiſting upon it, affirmed that he would not plead otherwiſe.

Counſel *aſſigned* on an indictment for a *miſdemeanor*. Poſt. 504. 1. Sid. 271.

Whereupon IT WAS ADJUDGED, he ſhould be committed to the marſhal, and that he ſhould ſtand upon the pillory at *Weſtminſter* and *Cheapſide* with a paper mentioning the offence, and with ſuch a paper be brought to all the courts at *Weſtminſter*, and be continued in priſon until he made his ſubmiſſion in every court, and that he ſhould be bound with ſureties to be of good behaviour during his life, and ſhould pay a thouſand pounds fine for that offence to the king.

The puniſhment of *pillory* may be inflicted for a libel. Poſt. 504. 5. Co. 125. 3. Inſt. 174. Fort. 201. 5. Com. Dig. P. C. 357.

588. Stra. 934. 8. Mod. 178. 1. Hawk.

R. C.'s Caſe.

Case 22.

THE ſame day *R C.* was brought to the bar (being removed from *St. Alban's* by *habeas corpus* and *certiorari*, where he was a priſoner, and *attainted* for felony, *viz.* for horſe-ſtealing). And it was now demanded of him, what he could ſay why execution ſhould not be done upon the indictment? And becauſe he could not ſhew good cauſe to ſtay the execution, he was committed to THE MARSHAL, who was commanded to do execution: and the next day he was hanged.

The king's bench may award execution to be done by *the marſhal* upon a perſon attainted of felony, who is brought into court by *hab.* 1. Lev. 61. 4. Burr. 2086.

cap. and the record of conviction removed by *certiorari*. Ante, 90.—1. Sid. 72. 1. Keb. 241. 2. Hale, 4. Poph. 131. Cro. Jac. 455. Foſter, 140. Strange, 553. 2. Hawk. P. C. 656.

Symms *againſt* Smith.

Case 23.

COVENANT. Whereas the defendant (reciting that ſhe had an eſtate for life in ſuch cuſtomary lands) covenanted, that ſhe would ſurrender the eſtate upon requeſt, and permit the plaintiff to enjoy the ſaid lands, and take the rents, iſſues, and profits of them; and in fact aſſigns for breach, that ſhe did not ſuffer him to enjoy the ſaid lands, but had received the rents, iſſues, and profits of them from the time of the making of the indenture until the day of the writ, &c.

In covenant by *A.* to permit *B.* to enjoy the rents, &c. a breach that *A.* took the rents and did not permit *B.* to enjoy, is well aſſigned; for the taking by *A.* is a ſpecial diſturbance. Poſt. 299. 8. C. Jones, 218, 272. 684.

The defendant demurs upon this declaration. And it was now argued at the bar by BALL, *for the plaintiff*, and by ROLLS, *for the defendant*. And the defendant ſhewed for cauſe,

1. Lev. 293. Hard. 132. 2. Vent. 278. 4. Bac. Ab. 18. Cowp. 125. Dougl.

FIRST,

SYMMS *againſt* SMITH.

FIRST, That there was not any requeſt alledged for the permiſſion.—*Sed non allocatur*; for the requeſt extends only to the ſurrender, and not to the permiſſion.

SECONDLY, That he doth not alledge a ſpecial diſturbance by entry or otherwiſe.

Several breaches may be aſſigned in COVENANT, but not in DEBT on bond for performance of covenants.
4. Co. 80. b. Cro. Jac. 171. 8. Co. 89. Poſt. 299. 2. Burr. 773.

THIRDLY, The breach is too general in aſſigning, that ſhe received the rents, iſſues, and profits of the lands, without ſhewing what, ſo as it might be iſſuable, and thereby recover in damages as much as the defendant received, according as it ſhall be proved to the jury.—But THE COURT conceived, that in *covenant* he may aſſign as many breaches as he will, though not in *debt* upon an obligation for performance of covenants (*a*); for in that caſe there ought to be a certainty, and certainly aſſigned; but in a covenant it may be aſſigned as general as the covenant is. And therefore it was adjudged for the plaintiff. 47. *Edw.* 3. *pl.* 3. 46. *Edw.* 3. *pl.* 4.

(*a*) But now by 8. & 9. Will. 3. c. 11. the plaintiff may, in this caſe, aſſign as many breaches as he pleaſes.

CASE 24.

Benſon *againſt* Flower.

Vide Ante, 166.

Damages and coſts paid to the ſheriff upon a *ca. ſa.* and continuing in the ſheriff's hands, are not aſſignable by the commiſſioners on the plaintiff's becoming bankrupt before the return of the writ.
Ante, 149. Poſt. 540. See W. Jones, 215. Jud. Reſ. 126, 127. 1. Peere Will. 253. Cooke B. L. 243. Dougl. 594. 1. Term Rep. 103.

THIS Caſe was moved again the laſt day of this Term, and the aſſignment before the commiſſioners was read in court: and foraſmuch as the becoming bankrupt and the aſſignment of the commiſſioners were after the writ of execution ſerved, although they were before the return of the writ, JONES, WHITLOCK, and MYSELF conceived, that the money in the ſheriff's hand was not aſſignable, although by the judgment the damages and coſts were aſcertained, and turned into *rem judicatam*; for it cannot be ſaid to be the bankrupt's money until it be paid to him; and in the mean time it is in the hands of the ſheriff, *quaſi in cuſtodiâ legis*. And the caſe is ſo much the ſtronger, becauſe it was upon a *capias ad ſatisfaciendum*, and the money paid to the ſheriff to ſatisfy the execution, ſo that it is not due to the plaintiff until it be paid to him: and none may give a diſcharge thereof but the plaintiff, who is party to the record; and being levied by record, it ought to be delivered unto him, who may acknowledge ſatisfaction upon the record; and the aſſignees are ſtrangers to the record, and cannot have the benefit thereof.—It was therefore reſolved, by the aſſent of HYDE, *Chief Juſtice*, who firſt doubted thereof, that this money ſhould be delivered to the party who recovered, he acknowledging ſatisfaction. *Mod. Rep.* 93.

CASE 25.

Shalmer *againſt* Foſter and his Wife.

Trinity Term, 5. *Car.* 1. *Roll* .

In an action for theſe words, "Where is that "lying thief thy "ſon? He hath "murdered my "*Aunt*, and I "will prove it;" Poſt. 37. 443. 1. Sid. 52.

ACTION FOR WORDS: For that the wife of the defendant ſpake of the plaintiff, to *Anne Rocheſter* the plaintiff's mother, theſe words: "Where is that lying thief thy ſon?" *innuendo* the plaintiff: "He hath murdered my aunt," *quandam* DOROTHEAM STOKE, *amitam defendentis* INNUENDO, "and I will prove it."

it muſt be averred in the declaration, that the plaintiff was *ſon of* the perſon ſpoken to. — Cro. Jac. 108. 635. 1. Roll. Abr. 84, 85. Cro. Eliz. 416. 1. Roll. Rep. 79. Cowp. 679. 4. Term Rep. 217.

The

SHALMER *against* FOSTER and his WIFE.

The defendant pleaded *not guilty*; and found for the plaintiff: and moved in arreſt of judgment, that theſe words are uncertain of whom they were ſpoken, no precedent communication being alledged to be *of* the plaintiff, nor that he was *the only ſon* of the ſaid *Anne Rocheſter*, to whom the words were ſpoken: and it may be that ſhe had divers ſons, and every of them might have an action as well as the plaintiff; and therefore, without ſuch averment or precedent communication of him, that the ſtanders-by might know without ambiguity who is meant by the words, the action is not maintainable.

WHITLOCK and MYSELF were of that opinion; for *non conſtat de perſonâ*: and, in proof of that point, I cited as a precedent the caſe of *Harvey v. Chamberlain* (*a*), and another caſe of *Benner v. Cadnam*, where for ſuch words it was adjudged for the defendant.

(*a*) Cro. Jac. 635.

HYDE, *Chief Juſtice*, and JONES, *Juſtice*, doubted thereof, becauſe it was alledged that ſhe ſpake *of* the plaintiff, and is found guilty.

But it was thereto anſwered, that ſo are the words in every declaration, and ſo it was in the precedents cited: but becauſe the words be not put in certain, nor aided by averment, the declaration is not good, and cannot be aided by the verdict. Whereupon the Court would adviſe. *Et adjournatur.*

Hilary

Hilary Term,

5. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1:

In ejectment againſt four, if three be found guilty as to part, and not guilty for the reſidue, and the fourth is found not guilty generally, the plaintiff may be amerced jointly as to all the defendants.
Ante, 54. 55.
Poſt. 453.

Cro. Jac. 134.
Hob. 54.
Co. Lit. 125.
1. Mod. 10.
Stra. 260.
Salk. 54.
Ld. Ray. 72.

Deckrow and Others *againſt* Jenkins.

EJECTMENT againſt four, of an houſe and twenty acres of land. Three of the defendants were found guilty of the houſe and ten acres of land, and not guilty for the reſidue. The fourth defendant is found not guilty generally, and judgment was entered, that he ſhould recover his term in the houſe and ten acres of land, and coſts againſt the three defendants; and that the ſaid three defendants *capiantur*, and that they be acquitted *quoad reſiduum*, whereof they be acquitted; and that the plaintiff *quoad* the three defendants, *pro falſo clamore*, for ſo much as they were acquitted; and *pro falſo clamore* againſt the fourth defendant, *ſit in miſericordiâ*.

And becauſe there were not two ſeveral *miſericordias*, SCILICET, as to the three defendants, *pro falſo clamore*, *pro tanto*, *&c.* whereof they were acquitted, *quòd ſit in miſericordiâ*; and *pro falſo clamore* as to the fourth defendant, *quòd ſit in miſericordia*; but joint *quoad* all the defendants, *quòd ſit in miſericordia*; it was aſſigned for error, and much inſiſted by GERMYN that it was error, Becauſe there ought to have been ſeveral amercements; and the joining of both amercements in one is error; and in proof thereof he relied upon 8. *Co.* 62. *Beecher's Caſe.*

But BROOME, *Secondary*, affirmed it to be the uſual courſe of that court, that if the one defendant be found guilty for part, and found not guilty for the reſidue, and the other defendant is found not guilty for all, then the entry is, that the plaintiff be *in miſericordiâ* but once, which is ſpecially entered.

THE COURT thereupon would further adviſe; and being moved again afterwards, judgment was affirmed. *Vide* 47. *Edw.* 3. 10. 9. *Hen.* 6. 2. 5. *Co.* 59.

NOTE, The prothonotaries ſaid, that it is the uſual courſe to make entries in this manner, yet that ſometimes they find entries have been made thus: "that *quoad* the three for ſo much whereof "they were acquitted, that he be *in miſericordiâ*; and for the fourth, "that he be *in miſericordiâ* (*a*).

(*a*) By 16. & 17. Car. 2. c. 8. no judgment ſhall be reverſed for the want of a *miſericordiâ* or a *capiatur*, or becauſe the one is put for the other. By 5. & 6. Will. 3. c. 12. the *capias pro fine* is taken away. On judgments therefore for the plaintiff in the common pleas, they now enter that the fine is remitted; and in the king's bench they take no notice of any fine or *capias* at all. But if judgment be for the defendant, then it is conſidered that the plaintiff and his pledges of proſecuting be nominally amerced for his falſe ſuit; and that the defendant may go without day. 4. Bl. Com. 378. Salk. 54. 2. Bac. Abr. 508.

Gryffyth

Gryffyth *againſt* Jenkins.

Case 2.

ERROR upon a judgment in *Wales*, in a *quod ei deforceat* in nature of a WRIT OF RIGHT.

Ejectment for ſo many acres of *furze* and *heath*, without ſhewing how many acres of each, is good; but in a WRIT OF RIGHT a greater certainty is required. Poſt. 573.

THE FIRST ERROR aſſigned was, Becauſe *the writ* being general, *the count* is, that he deforced him of a meſſuage, and of nine-and-twenty acres of land, thirty acres of meadow, forty acres of paſture, and of twenty acres *de jampnâ et brueriâ*, which ought to be ſhewn in certainty; as in *a præcipe* of twenty acres of meadow and paſture, if he ſhew not in particular the quantity of every of them and their nature, it is ill.—But here in this *quod ei deforceat* it is well enough; for *jampna* and *brueria* are not intended lands and ſeveral ſorts, but of one and the ſame land, which is *heath-ground* whereupon gorſe and furze are growing: and in proof thereof was cited the Caſe of the *Lady Howard v. Candiſh* in dower. Dougl. 305. 1.

Co. Lit. 5. 355. 1. Mod. 90. 5. Burr. 2672. Term Rep. 11.

THE SECOND ERROR aſſigned was, That the iſſue is not well joined, becauſe he pleaded he hath "*majus jus tenendi tenementa* "*prædicta*" than the plaintiff, and he doth not ſay "*ſibi et hæredibus ſuis*," according to the uſual courſe; for it may be that he was tenant for life, or tenant in tail; and therefore becauſe he did not ſhew in certainty *que eſtate*, it was ill.—*Sed non allocatur*; for the Court would not intend he had a leſſer eſtate than in fee; and if he were but tenant for life, it was at his own peril to plead in that manner, for it is a forfeiture of his eſtate: and it was held to be no error.

Iſſue joined in a *quod ei deforceat*, on a plea that he hath *majus jus tenendi, &c.* than the plaintiff, is good, without ſaying *ſibi et hæredibus ſuis*. Co. Lit. 251. b.

THE THIRD ERROR aſſigned was, Becauſe the *venire facias* had not fifteen days betwixt the *teſte* and the return thereof, but was the next day after the *teſte*.—*Sed non allocatur*; for in *Wales* they have their proceſs from day to day in one and the ſame ſeſſion. Wherefore the judgment was affirmed. 1. *Saund.* 73.

A *venire facias* in a real action in the grand ſeſſion in *Wales* may be made returnable the day after the *teſte*.

Gylbert *againſt* Fletcher.

Trinity Term, 4. Car. 1. Roll 1359.

Case 3.

COVENANT againſt an apprentice for departing from his ſervice without licence (*a*) within the time of his apprenticeſhip. The defendant pleaded, that at the time of making the indenture he was within age; and thereupon it was demurred.

Breach of covenant will not lie againſt an infant apprentice upon his indentures. Hutton, 63. Moor, 135. Cro. Eliz. 653. Cro. Jac. 494. Stra. 1083. 1132. 3. Com. Dig. 165. 4. Com. Dig. 94. 5. Com. Dig. 234. 2. Vern. 492. 1. Bl. Com. 466. Co. Lit. 172. a. R. 513. Dougl. 518. 1. Term Rep. 40. 2. Term Rep. 159.

It was argued at the bar, that this indenture ſhould bind the infant, becauſe it was for his advantage to be bound apprentice to be inſtructed in a trade. He is alſo compellable by the 5. *Eliz.* c. 4. to be bound out an apprentice.

But ALL THE COURT reſolved, that although an infant may voluntarily bind himſelf apprentice, and if he continue apprentice for ſeven years may have the benefit to uſe his trade, yet neither at the common law, nor by any words of the 5. *Eliz.* c. 4. (*b*), ſhall the covenant or obligation of an infant for his apprenticeſhip

(*a*) By 6. Geo. 3. c. 25. if an apprentice abſent himſelf from his ſervice before his time is expired, he ſhall ſerve for ſo long time as he has abſented himſelf, or make ſatisfaction, or be committed to the houſe of correction for three months; but this does not extend to apprentices giving more than ten pounds, or after ſeven years elapſed beyond their term.

(*b*) *Vide* 8. Ann. c. 9. 18. Geo. 2. c. 22. and 20. Geo. 2. c. 45.

bind

GYLBERT *against* FLETCHER.

See Mr. Conſt's edition of Bott's Poor Laws, page 503. to 519.

bind him. But if he miſbehave himſelf, the maſter may correct him in his ſervice, or complain to a juſtice of peace to have him puniſhed, according to the ſtatute. But no remedy lieth againſt an infant upon ſuch covenant: and therefore it was adjudged for the defendant. *Vide* 21. *Hen.* 6. 31. 21. *Edw.* 4. 6. 9. *Hen.* 6. 8.

CASE 4.

Babington *againſt* Wood.

A bond given in conſideration of being promoted to a benefice, conditioned to reſign it on requeſt, is not ſimony.

Hutton, 111. Jones, 220. Cro. Jac. 248. 274. Raym. 175. 1. Sid. 387. 2. Roll. 417. *Sed vide* Moor, 641. Stra. 227. 534. 1. Vern. 411. 2. Bl. Com. 280. 1. Eq. Ca. Abr. 86. 2. Ch. Caſ. 99. 399. Vern. 131. 411. Prec. Ch. 182. Sayer, 141. and ſee the caſe of Bagſhaw *v.* Buſſey, 4. Term Rep. 78. and Partridge *v.* Williſton, 4. Term Rep. 355.

DEBT upon an obligation conditioned, Whereas the plaintiff intended to preſent the defendant to ſuch a benefice, that if the defendant at any time after his admiſſion, inſtitution, and induction, at the plaintiff's requeſt, reſigned the ſaid benefice into the hands of the biſhop of *London*, that then, &c. The defendant, upon *oyer* of the condition, demurred generally.

And this was argued by GRIMSTON for the plaintiff, and by CALTHROP for the defendant, who ſhewed, that the cauſe of demurrer was, For that the condition of the bond being to reſign upon requeſt of the patron, it is *ſimony* and againſt law, ſo the bond void.

But ALL THE COURT conceived, that if the plaintiff had averred, that the obligation was made to bind him to pay ſuch a ſum, or to make a leaſe, or other act which appears in itſelf to be *ſimony*, then upon ſuch a plea peradventure it might have appeared to the Court to be ſimony, and might have been a queſtion, Whether ſuch a bond for ſimony ſhould be void? But as it is pleaded by the condition, it doth not appear that there is any ſimony; for ſuch a bond to cauſe him to reſign may be good, and upon good reaſon and diſcretion required by the patron, *viz.* if he be non-reſident, or take a ſecond benefice by a qualification, or the like. And a precedent was ſhewn in *Jones v. Lawrance* (*a*), where ſuch a bond was made to reſign a benefice upon requeſt, when the ſon of *Jones* came to twenty-four years of age, to the intent that he then might be preſented to it; and it was adjudged good in the king's bench, and affirmed in a writ of error in the exchequer chamber. And ALL THE COURT was of this opinion; whereupon judgment was given for the plaintiff.

(*a*) Cro. Jac. 248.

CASE 5.

Keyley *againſt* Manning.

Trinity Term, 3. Car. 1. Roll 971.

A *royal proclamation* is not binding unleſs it be under THE GREAT SEAL, and therefore it ought to be ſo pleaded. Ante, 162. Poſt. 461. 482. 1. Roll Rep. 172. 12. Co. 75. 2. Inſt. 63. 4. Com. Dig. 432.

COVENANT for not building of an houſe, where the defendant covenanted, That he would erect three houſes upon ſuch land demiſed to him, unleſs he were reſtrained by the King's proclamation, &c. The defendant pleaded, that ſuch a day and year the king made a proclamation to reſtrain building.

The plaintiff thereupon demurred; and the cauſe ſhewn was, Becauſe a proclamation was pleaded, and no place expreſſed where the proclamation was made, and ſo no *viſne*, if iſſue ſhould have been joined thereupon: alſo becauſe it is not pleaded to have been made *ſub magno ſigillo Angliæ*; otherwiſe it is not good.

And ALL THE COURT were of this opinion upon the firſt motion, becauſe a proclamation binds not unleſs it be under THE GREAT

GREAT SEAL; and if it be denied there can be no iſſue thereupon, but only "*nul tiel record*," which cannot be unleſs he plead it to be *ſub magno ſigillo*.—But afterwards, being again moved, JONES and WHITLOCK ſeemed to doubt thereof, becauſe when it is pleaded that ſuch a proclamation was made, it ſhall be intended duly made; as in *re cons* it is returned *quod fecit warrantum*, although it be not pleaded to be in writing, yet it ſhall be intended. But it was thereto anſwered, True it is, when it is but by way of inducement; but otherwiſe, when it is the ſubſtance of the plea. Whereupon it was adjourned.

KEYLEY *againſt* MANNING.

The King *againſt* Sir John Elliot, Denzell Hollis, and Benjamin Valentine.

CASE 6.

AN INFORMATION was exhibited againſt them by THE ATTORNEY GENERAL; reciting, "That a parliament was ſummoned to be held at WESTMINSTER *decimo ſeptimo* MARTII, *tertio* CAROLI *regis ibid. inchoat.* and that SIR JOHN ELLIOT was duly elected and returned knight for the county of *Cornwall*, and the other two burgeſſes of parliament for other places, and *Sir John Finch* choſen ſpeaker; that SIR JOHN ELLIOT, "*machinans et intendens, omnibus viis et modis ſeminare et excitare* diſcord, evil will, murmurings, and ſeditions, as well *verſus regem, magnates, prælatos, proceres, et juſticiarios ſuos, quàm inter magnates, proceres, et juſticiarios, et reliquos ſubditos regis, et totaliter deprivare et avertere regimen et gubernationem regni* ANGLIÆ *tam in domino rege quàm in conciliariis et miniſtris ſuis cujuſcunque generis, et introducere tumultum et confuſionem* in all eſtates and parts, *et ad intentionem* that all the king's ſubjects ſhould withdraw their affections from the king, the twenty-third of FEBRUARY, *anno quarto* CAROLI, in the parliament and hearing of the commons, *falsò, malitiosè, et ſeditiosè*, uſed theſe words, "The king's "privy council, his judges, and his counſel learned, have con-"ſpired together to trample under their feet the liberties of the "ſubjects of this realm and the liberties of this houſe." And afterwards, upon the ſecond of *March anno quarto* aforeſaid, the king appointed the parliament to be adjourned until the tenth of *March* next following, and ſo ſignified his pleaſure to the houſe of commons; and that the three defendants, the ſaid ſecond day of *March*, 4. *Car.* 1. *malitiosè* agreed. and amongſt themſelves conſpired to diſturb and diſtract the commons that they ſhould not adjourn themſelves according to the king's pleaſure before ſignified; and that the ſaid SIR JOHN ELLIOT, according to the agreement and conſpiracy aforeſaid, had maliciouſly, *in propoſitum et intentionem prædict.* in the houſe of commons aforeſaid, ſpoken theſe falſe, malicious, pernicious, and ſeditious words precedent, &c.; and that the ſaid *Denzell Hollis*, according to the agreement and conſpiracy aforeſaid between him and the other defendants, then and there *falsò, malitiosè, et ſeditiosè* uttered *hæc falſa, malitioſa, et ſcandaloſa verba præcedentia, &c.*; and that the ſaid DENZELL HOLLIS and BENJAMIN VALENTINE, *ſecundum agreamentum et conſpirationem prædict. et ad intentionem et propoſitum prædict.* uttered the ſaid words upon the ſaid ſecond day of *March* after the ſignifying the King's pleaſure to adjourn; and the ſaid *Sir John Finch* the ſpeaker endea-

An information againſt three members of the houſe of commons for *conſpiring* to diſturb the public tranquillity by accuſing the adminiſtration of an intention to ſubvert the liberties of the ſubject and the privileges of parliament, and for an *aſſault* by detaining the ſpeaker forcibly in the chair, to prevent an adjournment of the houſe, &c.

See Hume's Hiſt. Eng. 6. Vol. 215, 216. and poſt. 210. and 604. Prinn's 4. Inſt. 16. 13. Co. 63. Lit. Rep. 326.

THE KING *against* SIR J. ELLIOT, &c.

endeavouring to get out of the chair according to the king's command, they *vi et armis, manu forti et illicito*, assaulted, evil intreated, and forcibly detained him in the chair; and afterwards, he being out of the chair, they assaulted him in the house, and evil intreated him, *et violenter manu forti et illicito* drew him to the chair and thrust him into it, whereupon there was great tumult and commotion in the house, to the great terror of the commons there assembled, against their allegiance, *in maximum contemptum*, and to the disherison of the king, his crown, and dignity: for which, &c."

The court of king's bench may try and punish *crimes* and *misdemeanors* committed by members *in* the house of commons.

To this information the defendants appearing, pleaded to the jurisdiction of the Court, that the Court ought not to have cognizance thereof, because it is for offences done in parliament, and ought to be there examined and punished, and not elsewhere. It was thereupon demurred; and, after argument, adjudged that they ought to answer; for the charge is for conspiracy, seditious acts, and practices, to stop the adjournment of the parliament, which may be examined out of parliament, being seditious and unlawful acts, and this Court may take cognizance and punish them.

1. Mod. 66. 6. Mod. 45. Hob. 111. Salk. 19. Ld. Raym. 938.

Post. 210.

Afterwards divers rules being given them to plead, and they refusing, judgment was given against them, *viz.* against *Sir John Elliot*, that he should be committed to THE TOWER, and should pay two thousand pounds fine, and upon his enlargement should find sureties for his good behaviour; and against *Hollis* (*a*), that he should pay a thousand marks, and should be imprisoned, and find sureties, &c.; and against *Valentine*, that he should pay five hundred pounds fine, be imprisoned, and find sureties.

NOTE, That afterward in the parliament 17. *Car.* 1. IT WAS RESOLVED by the house of commons, that they should have recompence for their damages, losses, imprisonments, and sufferings sustained for the services of the commonwealth in the parliament of 3. *Car.* 1. *Vide postea, fol.* 604. the votes of the house of commons and resolution of the lords concerning the illegality of this judgment, 19. *Car.* 2.

Sir Manliff.

(*a*) The *Lord Hollis* brought a writ of error on this judgment pursuant to an order of the house of lords, and on the 15. April 1668 the judgment of the king's bench was reversed by the lords. L. C. B. PARKER's MSS.

Easter

Eaſter Term,

6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Pew's Caſe.

CASE 1.

THOMAS PEW was arraigned for the murder of one *Gardiner*; and upon evidence it appeared, That the ſaid *Gardiner* was a bailiff ſworn and known, and under-bailiff to the dean and chapter of *Weſtminſter*; and he having the ſheriff's warrant to arreſt the ſaid *Thomas Pew* upon a *capias* out of the common pleas, and ſeeing him in *Shire-lane* within the liberty of *Weſtminſter*, the ſaid *Pew*, ſeeing him come towards him, drew his ſword, and the ſaid *Gardiner* approaching to lay hold on him (not uſing any words of arreſt, as was proved), *Thomas Pew* ſaid (as it was proved upon examination of two witneſſes before the coroner), "Stand off! come not near me! I know you well enough: "come at your peril!" and the bailiff taking hold of him, he thruſt him with his ſword that he died immediately.—IT WAS HELD by all the Court, that it was murder; for he coming as an officer to arreſt, and not offering any other violence or provocation, although he uſed not the words "I arreſt you," or ſhewed him any warrant, becauſe peradventure he had not time, nor was demanded the cauſe, the law preſumes it to be malice and murder in him that ſo kills one being an officer and coming to execute proceſs.

If a defendant kill an officer who is about to execute legal proceſs upon him, he is guilty of murder, though the officer do not uſe words of arreſt, or expreſs his intention of making an arreſt.

Poſt. 537, 538. Kely. 66. 115. Sum. 45. Ld. Raym. 1302. 1574. 1. Hale, 438. 446. 458. 460. 2. Stra. 882. 3. Inſt. 52. 9. Co. 67. b. 40. Cowp. 830.

Cro. Jac. 280. Poſt. 132. 308. 312. 318 321.

Sir Stephen Bord *againſt* Cudmore.

CASE 2.

ERROR of a judgment in *debt* in the common pleas. The error aſſigned was, Becauſe debt was brought in *London* by *Cudmore* as aſſignee of *J. S.* of a reverſion of land in the county of *Somerſet*, upon a leaſe for years made at *London* of the ſaid lands, rendering the rent of twenty pounds yearly at the *Temple Church*, *London*, ſuppoſing the leaſe to be made at the pariſh of *St. Mary Bow*, in the ward of *Cheap*, *London*, for two years rent behind after the aſſignment of the reverſion and attornment thereto; whereas the action ought to have been brought in the county of *Somerſet*, where the land lies, becauſe the privity of contract failing by aſſignment of the reverſion, he is only to maintain the action upon the pri-

Debt for rent againſt the aſſignee of a reverſion upon a leaſe for years is *local*, and muſt be brought where the land lies.

Poſt. 143. 188. 16 *Hen.* 7. *pl* 1. 38. *Hen.* 6 *pl.* 15. 3. Co. 23. Hob. 57. 1. Saund. 238.

7. Co. 2. 3. Mod. 336. Salk. 80. Cro. Jac. 140. Latch. 197. W. Jones, 43. Dyer, 40. 1. Lev. 59. 2. Lev 80. 3. Lev. 233. 1. Sid. 401. Carth. 182. 1. Wilſ. 165. Tidd's Pract. 11. Cowp. 176. 3. Term Rep. 387.

Sir Stephen Bord *against* Cudmore.

vity in law for the interest of the reversion, and that ought to have been brought in the county of *Somerset*, where the land lies.

And this was agreed on the other side, unless the rent had been reserved payable at *London*, and in that case the action may be laid in *London*, for payment might have been there pleaded, and upon *nil debet* those in *London* might best take cognizance of the payment; and therefore the judgment was well given, and not error.

Sed vide Cro. Eliz. 328. 636.

But ALL THE COURT conceived, forasmuch as the privity of the contract is gone by the assignment of the reversion and the attornment, and the rent follows the land, the plaintiff being only intitled thereunto by reason of his having the land, therefore the action ought to have been brought only in the county where the land lies, and not elsewhere: whereupon the judgment was reversed.

Case 3.

James *against* Hayward.

If a *new* gate be erected across a public highway, it is a *common nuisance*, although it be not fastened; and any of the king's subjects passing that way may cut it down and destroy it.
Ante, 132.
Post. 510.
2. Roll. Ab. 144.
Jones, 221.
Co. Lit. 56.
5. Co. 101.
9. Co. 55.
Salk. 459.
Yelv. 142.
Cro. Jac. 446. 492.
Cro. Eliz. 320.
1. Com. Dig. 217.
2. Com. Dig. 398.
3. Com. Dig. 686.
4. Com. Dig. 166.
1. Hawk. P. C. 362. 364.

TRESPASS for breaking his close, and pulling up, cutting, and casting down a gate.

The defendant justifies, Because the gate was placed cross the highway, and so fixed that the king's subjects could not pass without interruption by reason of the said gate, to the nuisance of the king's subjects; and therefore he pulled up, cut, and cast down the said gate to use the said way.

The plaintiff shews, that he set up two posts on each side of the way, and hung the gate upon one of the said posts, for the preservation of the springs of the wood there from cattle, so as the subjects might pass the said way without prejudice or impediment at their pleasure; and traverseth that the gate was so fixed and tied that the king's subjects could not pass without interruption by the gate.

The defendant, upon that plea, demurred.

THE FIRST QUESTION was, Whether the erecting of a gate cross an highway, which may be opened and shut at the pleasure of passengers, be a common nuisance in itself in the eye of the law? it being an open gate fixed upon hinges that subjects may pass the said way at their pleasure.

SECONDLY, Admitting it to be a nuisance, Whether every one may pull up and cast down the said gate at their pleasure?

HYDE, *Chief Justice*, JONES, and WHITLOCK, for the FIRST, conceived, that the erecting of a gate, although it be not locked or tied, but that every subject may open it and have passage at his pleasure, is a NUSANCE; for it is not so free and easy a passage as if no such inclosure had been; for women and old men are more troubled with opening of gates than they should be if there were none.

But it seemed to ME that it is not any nuisance in itself, being so small a trouble, but much for the public good that there should be inclosures for the preservation of corn and grass from cattle straying. And the law accounts not such petty troubles to be nuisances; for it appears that there are many gates in divers high-

ways

ways which have been always allowed: and if it were a nuſance in itſelf there ſhould not be any gate, for there cannot be any preſcription for a nuſance; and the multitude of gates in ſeveral ways prove that it never was accounted to be any nuſance; and 2. *Edw.* 4. *pl.* 2. the erecting of a gate upon the way is pleaded, and admitted to be lawful enough. JAMES *againſt* HAYWARD.

For THE SECOND, they held, that admitting it to be a nuſance, although the uſual courſe is to redreſs it by indictment, yet every perſon may remove the nuſance; and HYDE, *Chief Juſtice*, JONES, and WHITLOCK, allowed, that the cutting of the gate was lawful; whereupon judgment was for the defendant. And JONES ſaid, that for ancient gates upon highways, it ſhall be intended they are by licence from the king, and upon a writ of *ad quod damnum* ſued out of chancery. But I conceived, that canno tbe for a ſtopping, &c. A public nuſance may be abated by a private individual. 4. Term Rep. 364.

Spalding *againſt* Spalding.

CASE 4.

ERROR of a judgment given in *Ely*. Upon a ſpecial verdict the Caſe was, That *John Spalding* had iſſue three ſons, *John*, *Thomas*, and *William*. He deviſed the land in queſtion to *John*, his eldeſt ſon, and the heirs of his body, after the death of *Alice*, the deviſor's wife; and if *John* died, living *Alice*, that *William* ſhall be his heir. Alſo he deviſed other lands to *Thomas*, and the heirs of his body; and if he died without iſſue, that then *John* ſhould be his heir. And he deviſed other lands to *William*, and the heirs of his body; and if all his ſons ſhould die without heirs of their bodies, that then his lands ſhould be to the children of his brother. *John* dies, having a ſon, in the life of *Alice*; *Alice* dies; and *William* enters upon the ſon of *John*:

A deviſe to *A.* and the heirs of his body in fee after the death of *B.* and if *A.* die, living *B.* that *C.* ſhall be his heir, ſhall be intended if *A.* die *without iſſue* in the life of *B.* and not as enuring to defeat the precedent eſtate-tail.

And, Whether his entry were congeable? was the queſtion.

It was adjudged in the court at *Ely*, that the entry of *William*, the ſon of *John*, in the life of his brother *John*'s ſon, was lawful; and this point was aſſigned for error.

S. C. Bulſt 360. S. P. 3. Lev. 125. 434. Cro. Jac. 260. 416. 1. Peere Wms. 235. 427. 1. Vent. 230. Fearne, 308. 1. Wilſ. Rep. 427. 2. Wilſ. Rep. 196. Ld. Raym. 524. 5. Burr. 2707. Stra. 12. 798. 3. Com. Dig. 28. Powel on Dev. 254. Gilb. on Dev. 38. Caſes Temp. Talbot, 31. Ambler's Rep. 195.

HEDLEY, *Serjeant*, now moved, that the judgment was well given; for he pretended, this deviſe being to the heirs of his body, and if he died, living the ſaid *Alice*, that *William* ſhould be his heir, that it is a limitation to the eſtate of *John*, if he dies in the life of *Alice*, that then *William* ſhould be his heir; for that *tantamounts* that the land ſhould remain to *William* preſently; and it is not mentioned, that if he die, living *Alice*, without heir of his body; ſo it is a contingent eſtate to *William*: and he relied upon 7. *Edw.* 6. *title* "*Done*," and the Caſe of *Pell v. Brown* in this court (*a*).

But ALL THE COURT conceived, upon the whole context of the will, that it is to be conſtrued according to the intent of the party, and that the conſtruction ſhall be, that if *John* die *without iſſue*, living *Alice*, that then *William*, his youngeſt ſon, ſhould have it; and it ſhall not be conſtrued (where he limits it firſt to *John* and the heirs of his body, that by this limitation he intended, if he died, living *Alice*, that *William* ſhould be his heir), *John* having

Cowp. 234. Dougl. 264. 321. 337. 345. 1. Term Rep. 346. 3. Term Rep. 146. 484.

(*a*) Cro. Jac. 591.

SPALDING *againſt* SPALDING.

iſſue, and thereby to diſinherit the heirs of *John*'s body. And what was his intent appears by the other parts of the will, that the other ſons ſhall have other lands to them and the heirs of their body; and if they all die without iſſue, that it ſhall be to his brother's children, not meaning to diſinherit any of his children; and it ſhall not be ſuch a contingent remainder or limitation to abridge the former expreſs limitation. Wherefore they all conceived, that during the time *John* ſhould have heirs of his body *William* ſhould not have the land; whereupon the judgment was reverſed.

Cowp. 306.

CASE 5.

Cule *againſt* Executors of Thorn.

In *aſſumpſit* the contingency upon the event of which the cauſe of action ariſes muſt be expreſsly averred.

Cro. Jac. 404. 1. Mod. 294.

ASSUMPSIT. Whereas *Thorn*, the teſtator, in conſideration that the plaintiff would marry his daughter *Sarah*, promiſed to give him in marriage with her as much as he gave in marriage with any other of his daughters; and alledges in fact, that he married the ſaid *Sarah*; and that the teſtator had three daughters, *Alice* married to *Elkin*, and *Anne*, and the ſaid *Sarah*; and that he gave in marriage to the ſaid *Elkin* with the ſaid *Alice* an hundred pounds, and gave to him a bond of one hundred pounds to pay to the ſaid *Elkin* fifty pounds more at three months end after his deceaſe, "if the ſaid *Alice*, or any iſſue of her body, were then "living;" and aſſigns for breach of the promiſe, that he had paid to him only forty pounds in his life; and that he had required of the defendant his executor, to whom *aſſets* were left, the ſaid ſixty pounds reſidue, and a bond for the payment of fifty pounds more, and averred that the ſaid *Alice* had ſuch iſſue alive; and for not paying of ſixty pounds reſidue, and not delivering the bond, he brings this action. The defendant pleaded *non aſſumpſit*; and found for the plaintiff, and damages aſſeſſed to ſeventy pounds.

And it was moved in arreſt of judgment, that this breach is not well aſſigned: FIRST, Becauſe he promiſed to give as much as he gave with any other daughter; and that extends to as much as he gave in money, and not to the bond.—SECONDLY, If it extend to the bond, yet it ought to have been averred, that SARAH, *or ſome of the iſſue of her body, was alive*, and not that ALICE *and the iſſue of her body was alive*; and ſo the breach was ill aſſigned; and the damages being entire, judgment ought to be for the defendant.

And ALL THE COURT was of this opinion, but chiefly for the Second point; but as to the Firſt, ſome of them conceived, that it extends only to money preſently given, but they agreed not therein; but in the laſt they all agreed. Whereupon it was adjudged for the defendant.

Morgan

Morgan *againſt* Green, Adminiſtrator of John Green.

CASE 6.

DEBT; and demands one hundred and twenty pounds. And declares, That whereas the inteſtate was indebted to *J. S.* in divers ſums of money for wares ſold, and that *J. S.* became a bankrupt, and by the commiſſioners of bankrupts was ſo adjudged; and this debt amongſt others aſſigned to the plaintiff, being a creditor; and that the inteſtate died; whereupon he brought this action againſt the adminiſtrator, &c.

DEBT will not lie againſt an *executor* or *adminiſtrator* upon a ſimple contract debt aſſigned by commiſſioners of bankrupt.

Upon demurrer, it was argued by GERMYN, *for the plaintiff*, and by STONE, *for the defendant*.

S.C. Jones, 223. Moor, 206. Co. Lit. 295. 4. Co. 95. Cro. Jac. 47. 105. Off. of Ex. 117. 1. Com. Dig. 526, 527. 2 Bac. Ab. 443. Eſpinaſſe Dig. 183. 1. Term Rep. 91. 619. 4. Term Rep. 94.

And after argument ADJUDGED, that this action lies not; for DEBT upon a ſimple contract lies not againſt an executor or adminiſtrator: and although it was alledged it being aſſigned by the commiſſioners is *quaſi* a debt upon record, and the plaintiff enabled to this ſuit by act of parliament, and therefore *gager of law* lies not; and that for debt forfeited to the king by the common law no *law gager* lies, as is the common experience in the exchequer, where ſuch debts are forfeited and ſued; yet THE COURT held clearly, that the being aſſigned by the commiſſioners doth not alter the law, but that againſt an aſſignee *ley gager* lies; ſo againſt ſuch an adminiſtrator this action lies not. Wherefore it was adjudged for the defendant.

Weſt *againſt* Treude.

CASE 7.

Hilary Term, 5. Car. 1. Roll 318.

ACTION ON THE CASE. Whereas he was, and yet is, poſſeſſed of a leaſe for divers years, *ad tunc et adhuc ventur.* of an houſe, and being ſo poſſeſſed, demiſed it to the defendant for ſix months; and after the ſix months expired, the defendant being permitted by the plaintiff to occupy the ſaid houſe for two months longer, he the defendant during the ſaid time pulled down the windows, and divers other parcels of the houſe, and made great waſte therein to the prejudice of the plaintiff; whereupon he brought this action. The defendant pleaded "*not guilty*;" and found againſt him.

Either CASE or TRESPASS will lie by a landlord againſt his tenant at ſufferance for deſpoiling the premiſes.

S. C. Jones, 124. 224. 1. Roll. Ab. 104. 3. Lev. 131. 5. Co. 13. b. Cro. Eliz. 461. Ld. Raym. 99. 2. Wilſ. 145. Carth. 203. 1. Com. Dig. 264. 1. Bac. Ab. 55. Co. Lit. 57. b. 1. Term Rep. 12. 430. 480. 535. 2. Term Rep. 166. 232.

STONE moved in arreſt of judgment, that this action lies not; for it was the plaintiff's folly to permit the defendant to continue in poſſeſſion, and to be tenant at ſufferance, and not to take courſe for his ſecurity; and if he ſhould have an action, it ſhould be an action of treſpaſs; as *Littleton, Sect.* 71, if tenant at will hath deſtroyed the houſe demiſed, or ſheep demiſed, an action of treſpaſs lies, and not an action upon the caſe.

But ALL THE COURT conceived, that an action of treſpaſs or an action upon the caſe may be well brought at the plaintiff's election: and properly in this caſe it ought to be an action on the caſe, to recover as much as he may be damnified, becauſe he is ſubject to an action of waſte; and therefore it is reaſon that he ſhould have his remedy by an action upon the caſe. Whereupon rule was given that judgment ſhould be entered for the plaintiff.

Case 8.

Bachelour *againſt* Gage, Executor of Gage.

An action will lie againſt a leſſee for the breach of an "*expreſs* "*covenant*" by his aſſignee of the term, although the leſſor has acknowledged the aſſignee as his tenant by accepting rent from him.

Poſt. 221. 580.

5. Co. 16. b. 3. Co. 24. b. Cro. Car. 184. 580. 1. Saund. 237. 1. Lev. 259. Cro. Jac. 334. 522. Cro. Eliz. 555. Pop. 120. Moor, 600. 1. Sid. 266. 2. Vent. 209. 3. Mod. 326. Strange, 1221. 2. Com. Dig. 563. 642. Dougl. 461. 463. 764. 1. Term Rep. 310. 441. 3. Term Rep. 393.

COVENANT. Whereas by indenture, bearing date, &c. betwixt the plaintiff and the teſtator of the defendant *teſtatum exiſtit*, that the plaintiff demiſed ſuch a meſſuage or tenement with a garden, in the pariſh of *St. Martin's in the Fields*, adjoining to the plaintiff's houſe, to the teſtator for the term of twenty-one years; and the teſtator, by the ſame indenture, covenanted for himſelf, his executors and aſſigns, that he would not erect any building in the ſaid garden to the prejudice of the plaintiff's light; the plaintiff alledges in fact, that ſuch an aſſignee of the teſtator's againſt that covenant had erected an houſe in the ſaid garden, to the prejudice of the plaintiff's lights in his houſe adjoining, for which, &c.

The defendant pleads, that the ſaid leſſee aſſigned over his term to one *J. S.* who entered and paid his rent to the plaintiff, and the plaintiff accepted him for his tenant; and therefore demanded judgment *ſi actio*.

The plaintiff thereupon demurred.

And now this Term it was argued by WILD, *for the defendant*, and by CRAWLEY, *Serjeant, for the plaintiff*. And for the defendant,

FIRST, That this covenant lies not againſt the executor of the leſſee; for he having aſſigned over his term, and the leſſor having accepted the rent of the aſſignee, the *privity of contract* is determined, eſpecially it being a contract which concerns an act to be executed upon the land, and therefore runs with the land; and he cannot have an action againſt the leſſee himſelf or his executors: and as an action of debt lies not againſt the firſt aſſignee, ſo covenant lies not.—But ALL THE COURT conceived, that inaſmuch as it is *an expreſs covenant* that he ſhall not build, it ſhall bind him and his executors, and no aſſignment nor acceptance of the rent by the hands of the aſſignee ſhall take from him the advantage of ſuing him or his executors upon an expreſs covenant; no more than if a leſſee had obliged himſelf in an obligation to pay his rent, his aſſignment over of his term, and the acceptance of the rent by the leſſor of the aſſignee, ſhall not take from him the advantage of the obligation. See for this the caſe of *Brett v. Cumberland* (*a*).

(*a*) Cro. Jac. 399. 521. Poph. 136. 3. Bulſt. 163. Godb. 276.

1. Roll. Rep. 359. 2. Roll. Rep. 63.

In covenant, a declaration that by ſuch an indenture *teſtatum exiſtit* is ſufficient.

SECONDLY, It was moved, that this declaration was not good, becauſe it is by ſuch an indenture *teſtatum exiſtit*, and he doth not ſay expreſly that *dimiſit et convenit*; and compared it to the caſe of *Browning v. Beſton* (*b*), where it is *continetur in tali indenturâ*, &c. and 2. *Edw.* 4. *pl.* 21.—But ALL THE COURT conceived, it is good enough; and the uſual courſe in this court is to declare in this manner, that by ſuch an indenture *teſtatum exiſtit*, &c.

Plowd. 126. 5. Co. 16. Cro. Eliz. 195.

Cro. Jac. 383. 522. 537. 2. Leon. 74 2. Jones, 229. 5. Com. Dig. 232. Dougl. 667.

A declaration in *covenant* on a demiſe of "a "meſſuage *or* "tenement," is ſufficiently certain.

THIRDLY, Becauſe it is declared that he demiſed *meſſuagium ſive tenementum*, which is uncertain.—*Sed non allocatur*: for true it is, that ſo it ought not to be in an ejectment (*c*), or an indictment upon the ſtatute of 8. *Hen.* 6. c. 9. wherein he is to have poſſeſſion; but here it is only a recital of the words of the leaſe, and to have damages only. Whereupon it was adjudged for the plaintiff.

Cro. Jac. 124. 621, 633. 3. Leon. 228. 3. Mod. 238. 1. Sid. 295. 1. Term Rep. 11.

(*b*) Plowd. 141. (*c*) *Sed vide* Barnes, 184. 3. Wilſ. 23.

Bethyll

Bethyll *against* Parry.

CASE 9.

ERROR of a judgment in *Caernarven*. The error assigned was, Becauſe that in 12. *Jac.* 1. a *venire facias* was returned in this manner: "*Per* THOMAM RAVENSCROFT *vicecomitem. Iſtud breve* "*cum panello annexo mihi deliberat' fuit per* THOMAM HANMER *mi-* "*litem, nuper vicecomit' in exitu ab officio ſuo* (*a*);" and thus indorſed, "THOMAS HANMER *miles, nuper vicecomes*," which is not good: for it appears that it was returned by one who had no authority; for in ſaying *nuper vicecomes*, excludes him that he was not ſheriff when he made the return: and then it is without authority, and as no return, or as if it had been returned with a blank; for then it ſhould be ill by the ſtatute of *York*, 12. *Edw.* 2. c. 5. before the ſtatute of 21. *Jac.* 1. c. 13. which aids ſuch returns after verdict. See the caſe of *Rowland v. James* (*b*), where, by reaſon of a blank returned, the trial was held ill.

A writ returned by the new ſheriff, with a return indorſed by the old ſheriff, and ſigned *A. B. late ſheriff*, is *good*. Poſt. 570. 39. *Hen.* 6. 41. 1. Leon. 139. Hob. 70. Moor, 65. 548. Cro. Eliz. 703. Cro. Jac. 188. Carth. 56. Salk. 265. Fitzg. 5. Strange, 316. 5. Com. Dig. 444.

But HYDE, JONES, and MYSELF held, that it was good enough, for it appears by the record that he was ſheriff next before *Thomas Ravenſcroft*; for the plaintiff, at the aſſizes in *July* before, put in his challenge that *Thomas Hanmer*, then ſheriff, was couſin to him, and ſhewed how; and therefore prayed a *venire facias* to the coroners, and the defendant denied the *couſinage*; wherefore the *venire facias* was awarded to the ſheriff: and then when, *in exitu officii ſui*, he delivered that writ returned *Thomas Hanmer miles*, it is ſufficient to ſatisfy the ſtatute; for he needed not alledge his name of office, for at the common law it was good without returning his name thereto. Now the ſtatute appoints, "That he who returns ſhall "add his name to the return;" which is ſufficient, if it be his chriſtian and ſirname, and his name of office is not requiſite, as in *Dive and Manningham's Caſe* (*c*): then being returned by him, and his name to it, the addition of *nuper vicecomes* (for it ſhall not be intended that he returned it when he was not ſheriff, but that he returned it when he was ſheriff, and made that addition when he delivered it to the new ſheriff) ſhall not make the return void: and divers precedents were ſhewn, where they were returned in the ſame manner; all which ſhould be reverſed if there ſhould be a reverſal hereof; and when by any way or conſtruction the Court may intend it to be good, they ſo ſhall intend it. And as it was agreed that theſe words "*nuper vicecomes*" doth neceſſarily imply that he was not then ſheriff at the time of the delivery of the writ to the new ſheriff, ſo it is to be conſtrued, that by the words "*nuper vicecomes*" he was ſheriff at the time of the panel made: and if he had returned it without thoſe words "*nuper vicecomes*" it had been clearly good, then the addition thereof ſhall not make it ill.—But WHITLOCK, *Juſtice*, ſeemed to doubt thereof: wherefore THE COURT would farther adviſe.

(*a*) See 29. Geo. 2. c. 37. Dougl. 463. (*b*) 5. Co. 41. (*c*) Plowd. 63.

Shepheard's

CASE 10. Shepheard's Case.

In pleading title by a copyhold, it is not sufficient to alledge *seisin* in fee and admittion, without shewing the *grant*; but the omission is helped on a collateral issue.
Ante, 54.
Post. 229.
4. Co. 22.
3. Bulst. 230.
Hutt. 54
Rell. Rep. 221,
2. Vent. 144.
182.
4. Mod. 346.
Cro. Jac. 52.
103.
2. Com. Dig.
530.
5. Com. Dig. 79.
4. Bac. Ab. 101.
113.

TRESPASS for breaking his close. The defendant justifies, Because it was the freehold of *J. S.* and he entered by his command. The plaintiff entitles himself, Because the place WHERE is customary land, parcel of such a manor, whereof *J. S.* is seised in fee, &c. and demisable by copy at will in fee; and that *J. N.* was thereof seised in fee by copy, at the will of the lord of the manor, according to the custom, &c. and died seised, so as it descended to two daughters, as heirs of the said *J. N.*; and that at such a court *dominus concessit eis extra manus suas, &c. habendum et tenendum tenementa prædicta* to the said daughters and their heirs, whereby they were seised in fee, and demised to the plaintiff for years.

The issue being joined upon a collateral matter, and the verdict given for the plaintiff, it was moved in arrest of judgment, that the plaintiff had not made a good title; for none may entitle himself to any copyhold, but he ought to shew a grant thereof; and therefore he shewing such a one was seised in fee without shewing the grant thereof, it was not good.

ALL THE COURT were of that opinion, that it was no good manner of pleading,

But HYDE, JONES, and WHITLOCK conceived, it was but a default in the form; and the issue being taken upon *a collateral matter*, and found for the plaintiff, it is helped by the statute of jeofails. Whereupon it was adjudged for the plaintiff.

See 16, & 17. Car. 2, c. 8, and 4. & 5. Ann. c. 16.

CASE 11. Nash *against* Preston.

An equity of redemption is not liable to the dower of the wife of the mortgagee; but the wife of a *bargainee* shall have dower, although the lands were, by agreement, re-demised to the *bargainor* and his wife with an equity of redemption
2. Bl. com. 128.
Hardres, 466.
2. Com. Dig.
56.
3. Com. Dig.
128.
2. Bac. Abr. 127.
Equity Cas. Ab. 227. 1. Burr. 77. 1. Roll. Abr. 474.

A BILL IN CHANCERY was referred to JONES, *Justice*, and MYSELF, to consider Whether one should be relieved against *dower* demanded, &c.

The case appeared to be, That *J. S.* being seised in fee, by indenture inrolled, bargains and sells to THE HUSBAND for one hundred and twenty pounds, in consideration that he shall re-demise it to him and his wife for their lives, rendering a pepper-corn; and with a condition, that if he paid the hundred and twenty pounds at the end of twenty years, the bargain and sale shall be void. He re-demiseth it accordingly, and dies: his wife brings dower.

The question was, Whether the plaintiff shall be relieved against this title of *dower*?

We conceived it to be against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessees; for it was intended that they should have it re-demised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage: and upon a mortgage, if land be redeemed, the wife of the mortgagee shall not have dower. And if

a hus-

a husband take a fine *sur cognisance de droit come ceo*, and render arrear, although it was once the husband's, yet his wife shall not have *dower*; for it is in him and out of him *quasi uno flatu*, and by one and the same act. Yet in this case we conceived, that by the law she is to have *dower*; for, by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have *dower*: and when he re-demises it upon the former agreement, yet the lessees are to receive it subject to this title of *dower*; and it was his folly that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a court of equity shall not bar her to claim her dower; for it is against the rule of law, *viz.* "where no fraud or covin is, "a court of equity will not relieve." And upon conference with other the Justices at *Serjeants-Inn* upon this question, who were of the same judgment, we certified our opinion to the court of chancery, that the wife of the bargainee was to have *dower*, and that a court of equity ought not to preclude her thereof (*a*).

NASH *against* PRESTON.

Co. Lit. 31. b. 221. Cro. Jac. 615. 1. Eq. Ca. Ab. 311. Hard. 463. Powel on Mort. 75. 302. 2. Bl. Com. 158. 1. Burr. 77.

(*a*) See Neal. MSS.

v. Jewet, 2. Freeman, 43. 66. 71. *contra*, L. C. B. PARKER's

Trinity

Trinity Term,

6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Taylor *againſt* Starkey.

Hilary Term, 5. *Car.* 1. *Roll* 385.

It is actionable to call an attorney a common barrator; for words ſhall be taken *ſecundum conditionem perſonarum.*
Ante, 40.
Poſt. 460. 510.

ERROR of a judgment in the common pleas, in an action on the caſe for words. Whereas the plaintiff was, and is AN ATTORNEY of the common pleas; that the defendant, the firſt of *June*, 4. *Car.* 1. ſpake of the foreſaid plaintiff theſe words, "He is a common barrator, a *Judas*, a promoter;" and 1. *July*, 4. *Car.* 1. ſpake theſe words of the plaintiff, "He is a common "barrator, a cheater, and I will make him to be barred of his "practice."

S. C. Hutt. 104.
Moor, 61.
Hetley, 139. 143.
Hob. 117. 140.
1. Roll. Ab. 52.
Stra. 1138.
1. Com. Dig. 183.
4. Term Rep. 566.

The defendant pleaded not guilty; and it was found againſt him for the firſt words, and damages to fifty pounds: and he was acquitted for the words ſuppoſed to be ſpoken 1. *July*, 4. *Car.* 1. Judgment was given for the plaintiff as to the firſt words, and the fifty pounds damages; and for the defendant for the ſecond words.

TAYLOR, *of Lincoln's-Inn*, aſſigned for error, That an action lies not: for if it were ſpoken of a common perſon, who was not an officer, "that he is a common barrator," an action lies not; and ſo adjudged in this court (*a*). And here, although he be an attorney who brings this action, yet not appearing there was any ſuch ſpeech of him as attorney, or to ſcandalize him in his place, the words are ſpoken of him as of a common perſon; for the laſt words, which concern his practice, the defendant is found not guilty.

But ALL THE COURT conceived the action well lies; for it is a great ſlander to an attorney to be called and accounted "a common "barrator," who is a maintainer of brabbles and quarrels, and a quarreller and fighter: and words are to be conſtrued *ſecundum conditionem perſonarum* of whom they are ſpoken. Whereupon the judgment was affirmed.

(*a*) Cro. Eliz. 171.

CASE 2.

Johns and Robinſon *againſt* Dodſworth.

Verdict againſt ſeveral and ſeparate damages: The plaintiff may ſign judgment againſt both for the damages of *one*; and *ſo* waive off the damages againſt the other, without releaſing them.

ERROR of a judgment in an appeal of MAYHEM in *Durham*. The error aſſigned, Becauſe the plaintiff declaring there, in an appeal againſt them, that they, with a third, made the *mayhem*, they pleaded ſeveral pleas; whereupon ſeveral iſſues were joined, and verdict for the plaintiff; and againſt *Johns* upon the trial fifty

pounds

pounds damages were found, and againſt *Robinſon* one hundred pounds damages. And the plaintiff prayed judgment againſt both, for the one hundred pounds damages and coſts, and had it.

JOHNS and ROBINSON *againſt* DONSWORTH.

And now error is brought and aſſigned, Becauſe the plaintiff hath judgment for the one hundred pounds damages, and doth not releaſe the damages for the fifty pounds.

Ante, 55. Poſt. 243.

But THE COURT conceived it to be no error: for the judgment being for the one hundred pounds by the election of the plaintiff, it is a waiver of the other damages, and he cannot have both; therefore he needs not releaſe the damages of fifty pounds. Whereupon the judgment was affirmed.

11. Co. 7. a. Carth. 20. Lut. 875. 2. Saund. 264. 2. Stra. 872.

Simonds *againſt* Mewdeſworth.

CASE 3.

Hilary Term, 3. *Car.* 1. *Roll* 378.

DEBT upon an obligation *quinto Octobris decimo ſeptimo Jacobi*, of three hundred pounds conditioned for the payment of two hundred and ninety pounds in *April* following.

An agreement made between a *debtor* and his *creditors* to aſſure lands and aſſign goods to truſtees to be ſold for their benefit, and the produce divided amongſt them, cannot be pleaded in bar to an action of debt on bond brought by one of the creditors, though he was a party to the agreement, and the *lands* were ſold by the truſtees.

The defendant pleaded, that in *December decimo ſeptimo Jacobi*, by indenture, it was agreed betwixt the plaintiff and divers other creditors of the defendant (to whom the defendant was indebted in divers and ſeveral ſums of money particularly mentioned), that the defendant, by indenture of bargain and ſale, ſhould aſſure divers lands in the county of *Lincoln* to nine of the creditors, to be ſold by them, and the money to be paid amongſt the creditors, and aſſigned to them a leaſe for years of the cuſtoms of wines, and certain other ſums of money, which the ſaid creditors by the ſaid indenture accepted; and alledges in fact, that he by indenture bargained and ſold the ſaid land to the ſaid nine perſons, and made a letter of attorney to receive the ſums of money.

Ante, 85. 1. Roll. 129. 471. 1. Leon. 19. Cro. Jac. 650. 254.

The plaintiff thereupon demurs, Becauſe that the indenture ſounds in nature of a covenant; and if ſo, it ſhall not be in ſatisfaction, being in itſelf no ſatisfaction, nor pleadable in ſatisfaction of that debt: alſo admitting it had been a good ſatisfaction, if performed, yet part thereof not being performed, it is clearly no bar to this action.

Whereupon IT WAS ADJUDGED for the plaintiff; for *agreement* without *ſatisfaction* is to no purpoſe.

9. Co. 79. Dyer, 75. 356. Plowd. 5. Raym. 203. 451. 1. Mod. 69. 2. Keb. 690. Strange, 573. Dougl. 605. 2. Term Rep. 763. See the caſe of Heathcote v. Cruikſhanks, 2. Term Rep. 24. and 3. Term Rep. 599. 4. Term Rep. 166.

Sands *againſt* Trevilian.

CASE 4.

Michaelmas Term, 4. *Car.* 1. *Roll* 196.

ERROR of a judgment in the common pleas; where *Trevilian*, being an attorney, brought *an attachment of privilege* againſt *Sands*, and demanded againſt him debt of ten pounds; and declares, That he being an attorney there, the ſaid *Sands* retained him to proſecute a ſuit in the common pleas betwixt one *Symms* and *Worlich*, and deſired the plaintiff to be attorney for *Worlich*, and promiſed to pay him all his fees, and all that he ſhould lay out to counſel and officers of the court in that ſuit: and ſhews, that he laid out

An attorney may have *debt* for his fees and diſburſements againſt him who retained him; but for his bill in a cauſe for one at the requeſt of another,

aſſumpſit only lies. Ante, S. C. 107. 159.—Skin. 217, 218. Cro. Jac. 520. Moor, 366. 437. 453. 1. Hawk. P. C. 542. 2. Ld. Ray. 842. 1. Term Rep. 62. 4. Term Rep. 123. 1. Com. Dig.

See 3 Jac. 1. c. 7. and 2. Geo. 2. c. 23.

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SANDS *against* TREVILIAN.

such ſums, which amount to the money demanded; whereupon he brought this action.

The defendant there pleaded *nil debet*; and found againſt him, and judgment for the plaintiff.

Error was now aſſigned, That in this caſe debt lies not againſt him who ſo entreated him to be attorney; for there is no contract between them, nor hath he any *quid pro quo*; but he ought to have had an *aſſumpſit* (becauſe he did it at his requeſt); if he for whom he is retained doth not pay him his fees.—And thereto agreed ALL THE COURT; but if he ſhould have debt they doubted.

But ROLLS, *for the defendant*, in the writ of error, ſhewed, that he well might bring an action of debt, becauſe he retained him, which is a conſideration in itſelf: and he relied upon 37. *Hen.* 6. *pl.* 10. if one entreat a carpenter to make ſuch a thing for another, or to ſerve another for ſuch a time, and promiſeth him ten pounds, debt lies; ſo 17. *Edw.* 4. *pl.* 5. if one promiſe one hundred pounds if he will marry his daughter, he marries at his requeſt, &c. And he ſhewed a precedent, *Bradford v. Woodhouſe* (*a*), wherein it was adjudged, and affirmed in a writ of error, that debt lies. And he ſaid, there was a difference where one is retained generally for another with ſuch a promiſe to pay his fees, and as much as he ſhould expend in the ſuit, there debt lies: but if I retain one to be attorney for another, and promiſe if the other doth not pay, that I will pay, there if the party for whom the retainer is doth not pay, an action of the caſe lies againſt me upon my promiſe, and not an action of debt (*b*); but here an action of debt lies.

(*a*) Ante, 107.

(*b*) *Sed vide* 29. Car. 2. c. 3. 1. Roll. Ab. 594.

But ALL THE COURT conceived, that no action of *debt* lies here, but an action upon *the caſe* only: for the retainer being for another man, and he being attorney for another man who agreed to that retainer, there is no cauſe of debt betwixt him who retained and the attorney, and no contract nor conſideration to ground this action; and he who is ſo retained may well have debt for his fees againſt him for whom he was retained, he having agreed thereto; wherein there cannot be any wager of law; but againſt the defendant, who is a ſtranger to the ſuit, and at whoſe requeſt he took upon him to be attorney, debt lies not, as 27. *Hen.* 8. *pl.* 24.: and in the caſe of *Rolls v. Germyn* (*c*), it was ſo reſolved. Whereupon it was adjudged, that the firſt judgment ſhould be reverſed.

Cro. Jac. 520, 521.

RICHARDSON, *Chief Juſtice*, and HUTTON and HARVEY, *Juſtices* of the common pleas, being moved herein, ſaid, that this point was never moved before them (*d*); and they were of the ſame opinion, that debt lies not, but only an action on the caſe.

Ante, 159.

(*a*) 16. Jac. 1. Roll. 416. Cro. Jac. 520. (*c*) Cro. Eliz. 425. Moor, 366.
(*d*) *Sed vide* S. C. Ante, 107.

CASE 5.

Poynter *againſt* Poynter.

On an *aſſumpſit* to pay ſo much if the plaintiff marry the daughter of the defendant at his requeſt, an allegation that he did marry her, 1. Lev. 121.

ASSUMPSIT. Whereas the plaintiff and defendant having communication that the plaintiff ſhould eſpouſe the daughter of the defendant, the defendant promiſed, if the plaintiff *ad inſtantiam defendentis* would marry the defendant's daughter, he would pay to him twenty pounds, and give to him twenty FRENCH PIECES towards their wedding dinner; and alledges without ſaying at the defendant's requeſt, is ſufficiently certain. Plowd. 305. Co. Lit. 303. Cro. Jac. 404. 532. 2. Vent. 71. 2. Lev. 198.

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in fact, that he married the defendant's daughter, and had required him to pay the ſaid twenty pounds, and that he had not paid it; and that the twenty *French* pieces amounted to ſix pounds *Engliſh* money, and the defendant had not paid them. Upon *non aſſumpſit* pleaded it was found for the plaintiff. POYNTER *againſt* POYNTER.

BERKLEY, *Serjeant*, moved in arreſt of judgment, that the declaration is not good; for the promiſe is but conditional, if he *ad inſtantiam* of the defendant married his daughter, &c. and he alledges, that he married the defendant's daughter, but he doth not ſay *ad inſtantiam defendentis*: ſo it being a condition precedent, if he hath not averred performance thereof, there is no cauſe of action.

But ALL THE COURT conceived upon this agreement to marry the daughter *ad inſtantiam defendentis*, and he marrying her, it ſhall be intended to be *ad inſtantiam defendentis*, without averring that he after at the inſtance of the defendant married her.

A SECOND EXCEPTION was, Becauſe the promiſe is, "to give to "him twenty FRENCH PIECES;" that is, not twenty FRENCH CROWNS, for there may be other pieces.—*Sed non allocatur*; for *French* crowns are the common coin of *France*, and here known, and it ſhall be intended according to our uſual ſpeech. Whereupon it was adjudged for the plaintiff. *French pieces* ſhall be intended *French crowns*. Hetl. 112. 1. Bac. Abr. 169.

Harlow *againſt* Wright. CASE 6.

DEBT upon an obligation conditioned, That if the obligee, his executors, and aſſigns, from the time of the obligation, may enjoy ſuch land by virtue of ſuch a leaſe made unto him by the obligor, that then, &c. The defendant pleads, that *poſt obligationem* until the day of the bill the plaintiff had enjoyed that land. Upon this plea the plaintiff demurs. A PLEA, to debt on bond for the enjoyment of land, that "*poſt* "*obligationem* "until the day "of the bill the "plaintiff en-"joyed," is good, though it is not ſaid *ſemper poſt*. Ante, 6. 63. 5. Co. 121. Plowd. 26. 33. 104.

THE FIRST EXCEPTION was, Becauſe the defendant doth not ſay, "*à die confectionis ſcripti obligatorii, et ſemper poſt confectionem* "*ſcripti obligatorii*;" for it may be the plaintiff enjoyed it "*poſt* "*confectionem ſcripti obligatorii*," but "*non ſemper poſt.*"—*Sed non allocatur*; for a bar is good to a common intent, and it ſhall be taken that he always enjoyed it unleſs the contrary be ſhewn, which muſt come on the plaintiff's part.

A SECOND EXCEPTION was, Becauſe the defendant did not plead, that the plaintiff and his aſſigns enjoyed it according to the words of the condition; and it was ſaid, that the plaintiff had in truth made an aſſignment.—*Sed non allocatur*; for it ſhall not be intended the plaintiff had made an aſſignment unleſs he himſelf ſhews it, and it ought to be ſhewn on his part. Whereupon rule was given, that judgment ſhould be entered for the defendant. And the defendant need not ſay that the plaintiff enjoyed according to the words of the condition.

But it was moved to have the plaintiff diſcontinue his ſuit, for otherwiſe he ſhould be barred of his debt, whereas he had good cauſe of action: ſo THE COURT adjourned it until the next Term, that in the interim he might diſcontinue. Judgment ſuſpended to give the plaintiff an opportunity to diſcontinue. Cro. Jac. 35.

Salmon

Case 7.

Salmon *againſt* Percivall.

If a ſerjeant at mace of *London* arreſt *A.* on a plaint in the ſheriff's court, and *A.* tenders him good bail, which he refuſes to accept, *A.* may have an *action on the caſe* for refuſing the bail; but he cannot maintain *treſpaſs* for falſe impriſonment, the caption being by legal proceſs.

S.C. Jones, 226. 2. Roll Abr. 561. Cro. Eliz. 77. Cro. Jac. 94. 8. Co. 146. b. 2. Leon. 189. 2. Mod. 31. 2. Bl. Rep. 1169. 1190. 1. Com. Dig. 476. 489. 5. Com. Dig. 582. Cowp. 476. Dougl. 4c. 1. Term Rep. 536.

TRESPASS of battery, wounding, and impriſonment. The defendant, as to the *wounding*, pleads *not guilty*; and as to the *battery* and *impriſonment* juſtifies, Becauſe being a ſerjeant of the mace in *London*, by cuſtom there, upon a plaint of debt entered in any of the compters againſt any, he may arreſt him againſt whom ſuch plaint is entered, and carry him to priſon until he find bail; and juſtifies by reaſon of a plaint entered, &c.

The plaintiff replies, that after the arreſt he tendered to him ſufficient bail, *viz. J. S.* and *J. D.* and notwithſtanding he detained him in priſon, &c. *et hoc, &c.*

The defendant takes iſſue, that he did not tender him bail; and it was found againſt him for both iſſues, and entire damages given.

It was moved in arreſt of judgment, that having juſtified the arreſt and impriſonment, the tender of bail is not material; for he is not the party who ought to accept bail, but the Judge in court (*a*); therefore the iſſue as to this point is frivolous.

GERMYN, *for the plaintiff*, objected, that becauſe he refuſed to take bail, he was a treſpaſſer *ab initio*; as he who enters into a tavern and takes a cup away, or where tenant at will pulls down the houſe.

But ALL THE COURT conceived, that when he juſtifies the arreſt and impriſonment, although he might have accepted bail (which they all agreed he could not) and refuſed, that doth not make the arreſt and impriſonment *tortious* to have treſpaſs; but he might upon the matter have had an action upon the caſe for detaining him in priſon after bail tendered; then when damages are given as well for the battery and impriſonment as for the wounding, the plaintiff ought not to recover. Whereupon it was adjudged for the defendant.

(*a*) 1. Bac. Abr. 108. 3. Wilſ. 341. Dougl. 674.

Case 8.

Dow and Others *againſt* Golding.

Hilary Term, 5. Car. 1. Roll 125.

The lord of a manor cannot aſſeſs an *unreaſonable fine* upon the ſurrender and admittance of a copyholder.

Co. Lit. 60. a. note (1). 4. Co. 27. b. 11. Co. 44. a. 13. Co. 3. 2. Bulſt. 32. 1070. 2. Com. Dig. 506. Dougl. 724. and

TRESPASS. Upon demurrer, the queſtion was, Whether the lord of a manor may aſſeſs two years and a half value of copyhold land according to rack rent for a fine upon ſurrender and admittance, and for non-payment enter for forfeiture?

And ALL THE COURT conceived, that one year and a half of rent improved is high enough, and the defendant aſſeſſing two years and a half it is unreaſonable, and therefore the plaintiff might well refuſe the payment thereof, and conſequently the entry of the defendant for a forfeiture not juſtifiable: whereupon it was adjudged for the plaintiff.

2. Roll. Abr. 265. Rep. Temp. Finch, 464. 1. Burr. 206. Carth. 13. Stra. 1042. 2. Ch. Rep. 134. 2. Bl. Com. 98. See the Caſe of Attle v. Grant, 2. Term Rep. 484.

Case 9.

Hughes's Caſe.

On *excom. cap.* if the *significavit* do not ſhew ſome of the cauſes required by 5. *Eliz.* c. 23. the king's bench, on *hab. cor.* will quaſh the writ; but the excommunication continues. Poſt. 199. 583.—2. Jones, 226. 2. Jones, 89. Show. 26. 1. Roll. Rep. 74. 12. Co. 77. Salk 293. 294. B. R. H. 314. Stra. 43. 76. 265. 946. 950. 1067. 3. Mod. 42. 89. atch. 104. 174. 1. Sid. 181. Ld. Raym. 619. 817. 2. Peere Wms. 436.

HUGHES being taken upon an *excommunicato capiendo*, becauſe he was condemned in the court of the vice-chancellor of *Oxford* in coſts, and had not paid them, the writ of *excommunicato ca-*

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fiendo was awarded upon a *significavit*, returned into chancery, and delivered here into court, according to the 5. *Eliz.* c. 23. HUGHES's CASE.

He being arrested thereupon, exception was taken, Because it is not expressed to be for some of the causes mentioned in the statute, and so void. And it was demurred thereupon. Cro. Eliz. 144.

LITTLETON moved, that although the *significavit* doth not mention any of the causes in the statute, but is for other causes, *viz. for costs*, yet the excommunication is good: but if any *capias* with proclamations and penalties therein be awarded, these penalties and forfeitures are void, unless the *significavit* express it to be for one of the causes mentioned in the said statute; but the excommunication itself is good enough. And so it was resolved in this court, upon long deliberation and debate, in the Case of one *Brown*, although some while before, upon sudden motion, and not well observing the words of the statute, some had been discharged of such *excommunicato capiendo*.

JONES and HYDE said, they well remembered *Brown's Case* to be so resolved; but none being there of the part of *Hughes*, they gave further day to be advised thereof. Bendl. 100. Latch. 174.

Lord Brook *against* Lord Goring. CASE 10.

UPON the Lord-Keeper's request, all the Justices and Barons were assembled for their resolution in the Case betwixt *Lord Brooks* and *Lord Goring*, which was thus:

If the king grant an office by patent, or make a demise for years, the acceptance of a new patent in the one case, or of a new lease in the other, is no surrender of the first grant.

Queen Elizabeth, in the nineteenth year of her reign, granted to *Fulk Grevill, esq.* the office of the clerk of the council of the marches of *Wales* for his life; and by another patent, 25. *Eliz.* granted to him the office of secretary there for his life; and in 1. *Jac.* 1. without recital of these patents, the said king grants the said offices to *Sir Fulk Grevill*, then knight, for his life: after, in 9. *Jac.* 1. the king, reciting the said patent of 1. *Jac.* 1. grants those offices to *Adam Newton* for his life, when, after the death, surrender, or forfeiture of the said *Sir Fulk Grevill*, they should become void: and after, in 14. *Jac.* 1. by another patent, reciting the patents of 1. and 9. *Jac.* 1. and omitting the grants 19. and 25. *Eliz.* the said king granted the said offices to *John Venor* and *John Mallet*, "HABENDUM "for their lives, *cum post mortem* of the said *Fulk Grevill* or *Adam* "*Newton*, surrender, forfeiture, or other determination, *vel alio* "*quocunque modo* the said offices should be void, or should come to "the king's hand to dispose, with a *non obstante*, a *malè nominando*, "or a *malè recitando prædicta officia, et non obstante malè recitando, malè nominando, vel non recitando, aliquod donum vel concessionem præ-* "*antea factum de officiis prædictis.*" 2. Roll. Abr. 496. 1. Vent. 297. 1. Bl. Rep. 118. 5. Com. Dig. 514. 1. Term Rep. 441.

And, Whether the patent of 14. *Jac.* 1. be good or not? was the question?

It was argued several days, *viz.* by HEDLEY, *Serjeant*, against the patent 14. *Jac.* 1. and by NOY for the patent; and, at another day, by BANKS against the patent, and by FINCH, *Serjeant*, for the patent.

[illegible] Barons, that the patent [illegible] was agreed by the [illegible] and 25. *Eliz.* were [illegible] *Sir Fulk Grevil*, [illegible] a new patent in [illegible] and not any *non* [illegible] was agreed in *Harris v.* [illegible] the queen take a new leafe [illegible] of the former leafe, it [illegible] of the former leafe: and [illegible] office cannot be fur- [illegible] nor there is not any revo- [illegible]

[illegible] Justices and Barons, that [illegible] 1. *Jac.* 1. as a good [illegible] therein, this grant is [illegible]

[illegible] was. Whether the clauses of [illegible] good (for otherwise, [illegible] that it was void), [illegible] and omits the re- [illegible] makes the HABENDUM [illegible] patentees which are [illegible] and misinformed; and, [illegible] principal question.

[illegible] to that point, that the *non* [illegible] patent, because the king re- [illegible] *verbal*, and intends [illegible] become void.

[illegible] and would not deliver any opi- [illegible]

[illegible] of the common pleas, HUTTON, [illegible] of the common pleas, DENHAM. [illegible] of the exchequer, WHITLOCK [illegible] of the king's bench, conceived, that [illegible] by reason of those mis- [illegible] or false recitals, but [illegible] false informations whereby the king was de- [illegible] for by intendment of the law conceived those grants were *good* which are void, and granted those offices after the determination of the said grants, *tanquam mode, &c.*; so the king is deceived, and the *non ens* shall not aid such false informations and false suggestions. 6. *Co.* 55. *Coudois Case.* 3. *Eliz. Dyer*, 197. *Hague's Case.* But there was not any certificate made of these Judges' opinions, because the parties compounded.

The King and Codrington *against* Rodman.

EXCOMMUNICATO CAPIENDO upon a sentence in *the* [illegible] for costs *in castigatione morum*. The sentence being before the 11. *Jac.* 1. divers *capias*' with proclamations and pe- [illegible] the bonds does not shew that the writ issued for one of the causes mentioned in 5. *Eliz.* shall be discharged.

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THE KING and CODRINGTON *againſt* RODMAN.

halties iſſued, according to the 5. *Eliz.* c. 23. The defendant, being now taken, pleaded, as to all the penalties and forfeitures, that it is not for any of the cauſes within the ſtatute, therefore as to them he ought to be diſcharged.—And ſo it was held by ALL THE COURT.

Jones, 227. 2. Roll. Ab. 178. Com. Dig. 291.

2. Inſt. 661. Lord Raym. 619. 817. Stra. 43. 76. 946. 1076. Salk. 274. 3.

As to the *excommunicato capiendo*, he pleaded, that the ſaid offence and contempt for which the excommunication was awarded, was before 21. *Jac.* 1. and pleads the general pardon of 21. *Jac.* 1. in diſcharge thereof: and it was thereupon demurred.—GERMYN, *for the plaintiff*, now moved, that this excommunication, being for coſts taxed for the party, the party having intereſt in the coſts being taxed (*a*) before the pardon, the general pardon ſhall not take away the coſts:—which was agreed by THE COURT; for a private perſon being intereſted in them, the pardon ſhall not take them away.

If a contempt of the ſpiritual court be pardoned, the excommunication is thereby diſcharged.

(*a*) See Rex *v.* Chamberlain, 1. Term Rep. 103.

GERMYN then moved, that as the coſts were not taken away, ſo no more is the excommunication, which is the means to enforce them to be paid; and it is as an execution at the common law, and ſhall not be diſcharged.

If *coſts* be awarded in the ſpiritual court, a pardon of *the offence* does not diſcharge the coſts. Ante, 9. 47.

GRIMSTON, *for the defendant*, moved, that this excommunication before the pardon is but for a contempt to the court, and all contempts are diſcharged, as contempts in chancery, ſtar-chamber, and other courts, are diſcharged by the general pardon, not being excepted therein. 8. *Co.* 69. *Trollop's Caſe.*

S.C. Jones, 227. 8. *Hen.* 6. *pl.* 19. 5. Co. 51. Plowd. 487. 2. Roll. Ab. 178. 304. Cro. Jac. 212. Parker, 280. 4. Butr. 2460.

And ALL THE COURT, *abſente* HYDE, *Chief Juſtice*, conceived, that this excommunication is diſcharged by the pardon; and all contempts before the pardon are diſcharged, and all the ſentences for the crime, except only the coſts, for the payment of which he ought to have new proceſs; but the Court would adviſe thereof. —Afterwards, in *Eaſter Term*, 7. *Car.* 1. being moved again, and a precedent ſhewn in court, of *Michaelmas Term*, 2. *Car.* 1. *Roll* 64. where it was adjudged to be diſcharged, it was ſo adjudged here likewiſe.

Smart *againſt* Dr. Eaſdale.

CASE 12.

ACTION FOR WORDS: "Thou *waſt* perjured, and haſt "much to anſwer for it before God."

"Thou *waſt* "perjured" is actionable; and if alledged to have been ſpoken *in præſentid*, it ſhall be intended, after verdict, *in auditu complurimorum*.

Exception after verdict in arreſt of judgment, For that it is not that he ſpake it *in auditu complurimorum*, or of any one, according to the uſual form.

SECONDLY, That the words, "Thou waſt perjured," is in the *time paſt* (*a*), and is extenuated by the ſubſequent words; *quaſi diceret*, although not anſwerable before men, yet before God.

Sed non allocatur; for it is not material how long ſince it was ſpoken; the fault remains; and it being found by verdict that he ſpake them, it is not material although he doth not ſay *in auditu plurimorum*. Whereupon it was adjudged for the plaintiff.

Poſt. 317. Cro. Eliz. 486. Cro. Jac. 39. 2. Lev. 193. 1. Com. Dig. 295.

(*a*) See the caſe of Carſlake *v.* Mapledurham, 2. Term Rep. 473.

Lord Brook *againſt* Lord Goring.

And it was agreed by all the Juſtices and Barons, that the patent of 1. *Jac.* 1. was merely void: for, First, it was agreed by the counſel of each ſide, that the patents of 19. and 25. *Eliz.* were good, and nothing objected againſt them: then *Sir Fulk Grevill*, being the patentee and alive, and he accepting a new patent in 1. *Jac.* 1. without reciting the former patents, and not any *non ob tantes* therein, it is clearly void; as it was agreed in *Harris v. Wings* (a), that if leſſee for years of the queen take a new leaſe for years of the ſame thing, without recital of the former leaſe, it is merely a void leaſe, and no ſurrender of the former leaſe: and it is ſtronger in this caſe; for the grant of an office cannot be ſurrendered by the taking of a ſecond grant, for there is not any revocation thereof.

(a) Moor, 415. 3. Leon. 242. 2. Roll. Rep. 70. 5. Co. 93. Cro. Eliz. 231.

Poſt. 259.

Secondly, It was agreed by all the Juſtices and Barons, that the patent of 9. *Jac.* 1. reciting the patent of 1. *Jac.* 1. as a good grant, which is void, and no *non obſtante* therein, this grant is merely void.

Moor, 449.

Thirdly, The principal queſtion was, Whether the clauſes of *non obſtante* in the patent of 14. *Jac.* 1. makes it good? (for otherwiſe, without a *non obſtante*, it was agreed by them all that it was void), becauſe it recites the two patents which are void, and omits the recital of the two patents which are good, and makes the habendum after the death or determination of the ſaid patentees which are void: ſo the king is deceived in his grant, and miſinformed; and, Whether the *non obſtante* doth help it? was the principal queſtion.

Hyde, *Chief Juſtice*, held clearly, as to that point, that the *non obſtante* helps it and makes it a good patent, becauſe the king relinquiſheth the advantage of *non-recital* or *falſe recital*, and intends to grant it by whatſoever means the ſame ſhall become void.

4. Co. 35. b.

Jones ſeemed to doubt thereof, and would not deliver any opinion herein.

But Richardson, *Chief Juſtice* of the common pleas, Hutton, Harvey, and Damport, *Juſtices* of the common pleas, Denham, Trevor, and Vernon, *Barons* of the exchequer, Whitlock, and Myself, *Juſtices* of the king's bench, conceived, that this patent of 14. *Jac.* 1. is merely void by reaſon of thoſe miſrecitals, which are not properly miſ-recitals or falſe recitals, but rather falſe informations or ſuggeſtions whereby the king was deceived; for by intendment the king conceived thoſe grants were good which are void, and granted thoſe offices after the determination of the ſaid grants, *vel alio quocunque modo*, &c.; ſo the king is deceived, and the *non obſtante* ſhall not aid ſuch falſe informations and falſe ſuggeſtions. 6. *Co.* 55. *Chandois Caſe.* 3. *Eliz. Dyer*, 197. *Blague's Caſe.* But there was not any certificate made of theſe Judges' opinions, becauſe the parties compounded.

Hob. 229.

Case 11.

The King and Codrington *againſt* Rodman.

On an *excommunicato capiendo* for a contempt of court, if the *ſignificavit* be 23. the party

Excommunicato capiendo upon a ſentence in *the delegates* for coſts *in caſtigatione morum*. The ſentence being before the 21. *Jac.* 1. divers *capias*' with proclamations and penalties to chancery does not ſhew that the writ iſſued for one of the cauſes mentioned in 5. *Eliz.* ſhall be diſcharged.

THE KING and CODRINGTON *againſt* RODMAN.

halties iſſued, according to the 5. *Eliz.* c. 23. The defendant, being now taken, pleaded, as to all the penalties and forfeitures, that it is not for any of the cauſes within the ſtatute, therefore as to them he ought to be diſcharged.—And ſo it was held by ALL THE COURT.

Jones, 227. 2. Roll. Ab. 178. Com. Dig. 291.

2. Inſt. 661. Lord Raym. 619. 817. Stra. 43. 76. 946. 1076. Salk. 274. 3.

If a contempt of the ſpiritual court be pardoned, the excommunication is thereby diſcharged.

As to the *excommunicato capiendo*, he pleaded, that the ſaid offence and contempt for which the excommunication was awarded, was before 21. *Jac.* 1. and pleads the general pardon of 21. *Jac.* 1. in diſcharge thereof: and it was thereupon demurred.—GERMYN, *for the plaintiff*, now moved, that this excommunication, being for coſts taxed for the party, the party having intereſt in the coſts being taxed (*a*) before the pardon, the general pardon ſhall not take away the coſts:—which was agreed by THE COURT; for a private perſon being intereſted in them, the pardon ſhall not take them away.

(*a*) See Rex *v.* Chamberlain, 1. Term Rep. 103.

If *coſts* be awarded in the ſpiritual court, a pardon of *the offence* does not diſcharge the coſts.

GERMYN then moved, that as the coſts were not taken away, ſo no more is the excommunication, which is the means to enforce them to be paid; and it is as an execution at the common law, and ſhall not be diſcharged.

Ante, 9. 47.

GRIMSTON, *for the defendant*, moved, that this excommunication before the pardon is but for a contempt to the court, and all contempts are diſcharged, as contempts in chancery, ſtar-chamber, and other courts, are diſcharged by the general pardon, not being excepted therein. 8. *Co.* 69. *Trollop's Caſe.*

S.C. Jones, 227. 8. *Hen.* 6. *pl.* 19. 5. Co. 51. Plowd. 487. 2. Roll. Ab. 178. 304. Cro. Jac. 212. Parker, 280. 4. Butr. 2460.

And ALL THE COURT, *abſente* HYDE, *Chief Juſtice*, conceived, that this excommunication is diſcharged by the pardon; and all contempts before the pardon are diſcharged, and all the ſentences for the crime, except only the coſts, for the payment of which he ought to have new proceſs; but the Court would adviſe thereof.—Afterwards, in *Eaſter Term*, 7. *Car.* 1. being moved again, and a precedent ſhewn in court, of *Michaelmas Term*, 2. *Car.* 1. *Roll* 64. where it was adjudged to be diſcharged, it was ſo adjudged here likewiſe.

Smart *againſt* Dr. Eaſdale.

CASE 12.

"Thou *waſt* "perjured" is actionable; and if alledged to have been ſpoken *in præſentid*, it ſhall be intended, after verdict, *in auditu complurimorum*.

ACTION FOR WORDS: "Thou *waſt* perjured, and haſt "much to anſwer for it before God."

Exception after verdict in arreſt of judgment, For that it is not that he ſpake it *in auditu complurimorum*, or of any one, according to the uſual form.

SECONDLY, That the words, "Thou waſt perjured," is in the *time paſt* (*a*), and is extenuated by the ſubſequent words; *quaſi diceret*, although not anſwerable before men, yet before God.

Poſt. 317.

Sed non allocatur; for it is not material how long ſince it was ſpoken; the fault remains; and it being found by verdict that he ſpake them, it is not material although he doth not ſay *in auditu plurimorum*. Whereupon it was adjudged for the plaintiff.

Cro. Eliz. 486. Cro. Jac. 39. 2. Lev. 193. 1. Com. Dig. 295.

(*a*) See the caſe of Carſlake *v.* Mapledurham, 2. Term Rep. 473.

LEVANNE'S CASE.

plus (it being averred that all legacies and debts are ſatisfied), that the adminiſtrator ſhould not retain them to his own uſe, but that they ſhould be diſtributed amongſt the friends of the inteſtate; and the ordinary will take ſecurity, that if debts be diſcovered afterwards, there ſhall be reſtitution of the goods to the adminiſtrator as much as will ſatisfy.

Ante, 62. Hob. 83. Moor, 864. R. 37. 540.

But ALL THE COURT reſolved, that a prohibition was well grantable, becauſe the abſolute intereſt in the goods is in the adminiſtrator; and the adminiſtration being committed, the ordinary hath nothing to do, and he cannot now, as he might at the common law, repeal the adminiſtration committed at his pleaſure; and it ſhall not be left to his diſcretion to provide reſtitution for debts diſcovered, for that might be inconvenient. Whereupon a prohibition was granted (*a*).

(*a*) This Caſe is now provided for by the ſtatute of Diſtributions, 22. & 23. Car. 2. c. 10. but this act does not extend to a *feme covert* inteſtate. See the 29. Car. 2. c. 3.

CASE 5.

Pilchard *againſt* Kingſton.

A declaration in *aſſumpſit* on a promiſe that if *A.* marry *B.* and make her ſuch a jointure, the defendant would make good to him her fortune of 600l. need not ſhew that the wife was not poſſeſſed of ſo much money.—See 29. Car. 2. c. 3.

ASSUMPSIT. Whereas the defendant, having communication with the plaintiff for the marriage of one *Margery*, affirmed that her portion was ſix hundred pounds; the defendant, in conſideration that he would marry the ſaid *Margery*, and aſſume that ſuch land ſhould be aſſured to her for her jointure, promiſed the plaintiff that he would pay to him one hundred pounds, *et firmam faceret* to him the ſaid portion of ſix hundred pounds; that he, at the requeſt of the defendant, eſpouſed the ſaid *Margery*, and does not ſay he had aſſured ſuch land to her for her jointure; and that the defendant had not paid the hundred pounds, *nec firmam faceret* to him the ſaid portion of ſix hundred pounds.

The defendant pleaded "*non aſſumpſit*;" which was found for the plaintiff.

GRIMSTON moved, in arreſt of judgment, that the declaration was not good, becauſe the plaintiff hath not ſhewn that he might not have the ſaid portion, or that the ſaid *Margery* had not ſuch a portion; for it may be the ſaid *Margery* had ſuch a portion in her own hands or in good debts, and the defendant did not promiſe *to pay* but to *make good* the portion, which is performed if ſhe hath ſuch a portion, and therefore the plaintiff ought to ſhew what he wants thereof. And ſuch allegation, that he *firmam faceret portionem*, is not good.

But ALL THE COURT held, that the declaration was good enough; for it purſues the words of the *aſſumpſit* in the breach alledged, and theſe words *tantamount* that he would warrant that he ſhould have ſuch a portion with his wife. And he pleads "*non* "*aſſumpſit*," and the jury found damages; which intends that they gave damages for ſo much as was wanting according to their evidence. Whereupon it was adjudged for the plaintiff (*b*).

(*b*) This judgment was afterwards affirmed in the exchequer-chamber on a writ of error.—2. Roll. Abr. 738.

CASE 6.

Downs *againſt* Winterflood.

The ſtatute 21. *Jac.* 1. c. 13. which amends records *after verdict* for error in miſnaming any of the jurors, &c. does not extend to amend a miſtake in the *chriſtian name*.—Poſt. 563.—Cro Jac. 28. 5. Co. 42. 1. Bac. Abr. 93. 3. Bac. Abr. 276.

ATTAINT. One of the jurors was returned by the name of *Alexander Prichett*; but in the *re-ſummons*, which was in nature

ture of *a diſtringas*, it was *Alexandrus Preſcott*, and he was ſworn by that name; and the verdict of *the petit jury* was affirmed by them. Downe *againſt* Winter-flood.

It was moved in arreſt of judgment, that this was tried by a wrong perſon, and therefore the verdict ill, and not aided by any ſtatute.

But the ſheriff and the ſaid juror being examined in court, it appeared, that *Alexander Preſcott* was his true name, and that he was the juror intended to be returned and truly ſworn, and that there was not any known by the name of *Alexandrus Preſcott* in the ſame town. Dougl. 114.

The queſtion was, If it ſhould be amended, as the miſpriſion of the clerk, by the 21. *Jac.* 1. c. 13.?

And IT WAS CLEARLY RESOLVED, that it is not to be aided by the 21. *Jac.* 1. c. 13. for that ſtatute extends only to the *ſirnames* of the jurors, or where their *additions* are miſtaken; in which caſes if by examination it may appear that he is the ſame perſon intended to be returned, the ſtatute aids that, but not where *a chriſtian name* is *miſtaken*.

For ſtaying the amendment, the counſel relied upon the caſe of *Goldwell v. Parker* (*a*), where *Palus Cheak* was returned in the *venire*, and the *diſtringas* was *Paulus Cheak*, which was his true name, yet it cannot be amended; and the record thereof, which was in *Michaelmas Term*, 33. & 34. *Eliz. Roll* 419. was ſhewn in court, where it appears, that for this cauſe the verdict was quaſhed, and a *venire facias de novo* awarded.—BUT NOTE, The miſpriſion was in the return of the *venire facias*, which was the firſt proceſs and return; but here in the ſecond, which ought to be guided by the former proceſs. —Wherefore THE COURT doubted thereof. *Et adjournatur*.

(*a*) 5. Co. 42.

Memorandum.

CASE 7.

THE eighteenth of *November* 1630, in this Term, JOHN WALTER, *knight*, the Chief Baron, died at *Serjeants-Inn*, being a profound learned man, and of great integrity and courage, who being Lord Chief Baron by patent, 1. *Car.* 1. *quamdiu ſe bene geſſerit*, being in the king's diſpleaſure, and commanded that he ſhould forbear the exerciſing of his judicial place in court, never exerciſed his place in court, from the beginning of *Michaelmas Term*, 5. *Car.* 1. until this day; and becauſe he had that office *quamdiu ſe bene geſſerit*, he would not leave his place, nor ſurrender his patent, without a *ſcire facias*, to ſhew what cauſe there was to determine his patent, or to forfeit it; ſo that he continued Chief Baron until the day of his death. But it appears that the Judges of both benches are made only *durante bene placito regis*, ſo as they are determinable at the king's pleaſure (*a*).

The death of Ch. B. Walter, who being appointed *quamdiu bene ſe geſſerit*, would not reſign upon *the king's command*.

(*a*) See now 12. & 13. Will. 3. and 1. Geo. 3. c. 23. 2. Hawk. P. C. 4, 5.

Aquila Weeks' Caſe.

CASE 8.

AQUILA WEEKS, keeper of the Gatehouſe, was ſued in an action on the caſe, for ſuffering *J. S.* to eſcape, who was in execution upon a judgment in *Trinity Term*, 2. *Car.* 1. He pleaded

If a record in an action for an eſcape from execution recite a *venire de novo* the judgment to be of one Term, and in the *niſi prius* roll it be entered of another Term, ſhall iſſue, although the miſrecital was by miſpriſion. Palm. 378. Godb. 328.

Aquila Weeks' Case.

Cowp. 407. 842. 1. Term Rep. 782. 2. Term Rep. 749.

not guilty in *London*; and it was found by *nisi prius*: and because the record of the *nisi prius* mentions the judgment to be in *Trinity Term*, 3. *Car.* 1. which was a misprision of the record, the plaintiff was nonsuited. And now it was moved by Germyn, *for the plaintiff*, that by reason of this misprision the record of the *nisi prius* is not warranted by the roll, and the nonsuit thereupon being null the *postea* shall not be recorded nor entered; for there is no warrant for this record of *nisi prius*. Wherefore it was prayed that a *distringas de novo* might be awarded: and upon the shewing of two precedents in this court, a *distringas de novo* was awarded.

Case 9.

Crowle *against* Dawson.

If a man covenant that the woman he is about to marry shall quietly enjoy all her goods, and after the marriage he takes the goods and *detains* them, it is a breach of the covenant.

1. Wood's Convey. ch. 5. f. 8. 5th edit. by Mr. Rowel. Cowp. 125. Dougl. 43. 1. Term Rep. 671.

Debt upon an obligation conditioned, That whereas the defendant should marry such a widow, who was possessed of divers goods, which were her first husband's, and the goods of his children, that her husband should not meddle with them, but that she and her children might enjoy them without disturbance, claim, or interruption of the defendant, or any claiming by him:

The defendant pleads performance of the covenants and agreements generally.

The plaintiff assigns for breach, That the said first husband was possessed of such sheep and goods, and that the wife had them before marriage, and that such a day after the marriage the defendant, her now husband, took the said goods into his hands, and them detained, and yet detains: and issue thereupon; and found for the plaintiff.

And moved in arrest of judgment, That this is no sufficient breach, for he doth not shew that the husband made any act or disturbance; for by the intermarriage the goods are in the husband; and it is not shewn that he disturbed the wife to enjoy them.

Hyde and Jones, *Justices*, were of that opinion.

But Justice Whitlock and Myself conceived otherwise, and that the breach is well assigned; for by the allegation that he took the said goods into his hands and detained them, is supposed, if not a forcible yet at least, a taking and detaining of them from the wife. And issue being joined, and found for the plaintiff, the Court intends not but that it was an unjust *caption* and *detention* contrary to the agreement: and afterwards Hyde, *mutat opinione*, upon the reading of the books, was of the same opinion. Whereupon, *absente* Jones, it was adjudged for the plaintiff.

Case 10.

King *against* Lorde.

Hilary Term, 5. *Car.* 1. *Roll* 795.

If a copyholder *for life* surrender to the lord generally, who grants it for life, and after admission the grantee dies, the surrenderor cannot be admitted again

3. Roll. Ab. 504. 442. 582. Co. Cop. 108, 109. Ld. Raym. 44.

Ejectment of a lease of *Lady Pagett*'s. Upon a special verdict the case was, *Lettice Knowls*, copyholder *for life*, surrenders, in consideration of twenty pounds, to the use of one *Dorothy Whystler*. The lord accepts the surrender, and grants it to *Dorothy Whystler* for her life, who was admitted accordingly, and dies. *Lettice Knowls* being alive, claiming it as her former estate, lets it to the defendant, and the lord enters, and lets to the plaintiff.

to the estate, but the lord shall have it. *Sed aliter* a copyholder *in fee*. Jones, 229. 3. Roll. Abr. 462. Popham, 39. *Sed vide* Gilb. Ten. 255. 257. Cro. Eliz. 361.

Whistler,

KING *against* LORDE.

WHISTLER, *for the defendant*, argued, that when a copyholder *for life* ſurrenders to the uſe of another, who is admitted, the firſt copyholder hath *quaſi* a poſſibility or remainder of an eſtate, that if he ſurvive him to whoſe uſe the ſurrender is made, that he ſhall have it again. But he agreed, that if a copyholder for life ſurrender his eſtate, to the intent that the lord ſhould grant it to whomſoever he pleaſed, then his eſtate was drowned, but not here: and for that he relied upon the book 9. *Eliz. Dyer*, 264.

1. Salk. 188. 1. Mod. 200. 6. Mod. 68. 3. Atk. 11. 2. Com. Dig. 500. Co. Lit. 59. b. note (2).

But ALL THE COURT conceived ſhe may not have it again, but that her eſtate is merely determined by the ſurrender, and that there is no difference as to that purpoſe, to ſurrender all her eſtate to the uſe of one, and to ſurrender generally; and the book of 9. *Eliz. Dyer*, 264. doth not warrant ſuch a difference. For if a tenant for life ſurrender to the uſe of another, and the lord grants it, he is merely in by *the lord*, and not by *the copyholder* who ſurrendered; but if a copyholder in fee ſurrender to the uſe of another for life who is admitted, he is in *quaſi* by the copyholder, and by his death the copyholder ſhall have it again, but not here. Whereupon it was adjudged for the plaintiff.

1. Term Rep. 600. 2. Term Rep. 198.

NOTE, This judgment was impeached by a writ of error, and the matter in law aſſigned for error. And by ALL THE JUSTICES of the common pleas AND BARONS of the exchequer, the judgment was affirmed.

The Lord Savill's Caſe.

CASE 11.

If judgment be obtained againſt a defendant in treſpaſs of aſſault, and he becomes a peer, *Quære*, What execution ſhall iſſue?

7. Co. 34. 9. Co. 49. 12. Co. 96. 2. Bl. Rep. 788. Strange, 743. Salk. 512. Ld. Raym. 1214. 1442. Douglas, 45.

SIR THOMAS SAVILL was ſued in the common pleas in treſpaſs of aſſault, battery, and wounding; and found for the plaintiff, and damages aſſeſſed to three thouſand pounds; and judgment being there for the plaintiff, error was brought and aſſigned: but upon examination of the record, there was no material error; whereupon judgment was affirmed by the rule of the Court. But before entry of the judgment *Sir Thomas Savill* procured a writ out of the chancery, directed to the Juſtices of the king's bench, *et quibuſcunque intereſſed*, wherein he ſhews to the Court, that *Sir John Savill* his father was created baron for his life, and after the barony was limited to the ſaid *Sir Thomas Savill*, being his youngeſt ſon, and to the heirs males of his body; and the writ recites, that he is a peer of the parliament; and therefore the writ commands, that no other proceſs ſhall be awarded againſt him but what ſhall be awarded againſt a peer of the realm.

BANKS moved, that this writ ſhould be recorded, and offered a plea compriſing ſuch matter, that after the laſt continuance, and before this Term, *Sir John Savill*, the father of *Sir Thomas Savill*, was created baron for his life, and that after his death the ſaid *Sir Thomas Savill*, who was his younger ſon, ſhould be a baron: and the plea ſhews, that *Sir Thomas Savill*, LORD SAVILL, died in *September* laſt, which was before *Octabis Michaelis*; and that the ſaid *Sir Thomas Savill* mentioned in the patent, and the ſaid *Sir Thomas Savill* mentioned in the record, *eſt una et eadem perſona*; and concludes his plea, and prays, that no proceſs of execution might be awarded againſt him but what ought to be againſt a peer of the realm:

LORD SAVILL'S CASE.

realm: and the writ was read in court, being the ſame which is in THE REGISTER (*a*); which is, where one is ſued in the common pleas in a perſonal action, and proceſs of outlawry, a writ is ſent out of the chancery, reciting, that he is a peer of the realm, and appoints, that no other proceſs ſhall be awarded againſt him than ſuch as ſhall be againſt a peer.

THE COURT appointed the writ to be recorded; but for the plea, becauſe there never was ſuch a precedent, and that he is not defendant in the action, as it is in the ſaid caſe in THE REGISTER; for he is plaintiff in the writ of error, and hath no day to plead; the plea was rejected; and the judgment being affirmed, they would adviſe what execution ſhould be.

(*a*) Folio 287. and Natura Brevium, 247. c.

Hilary

Hilary Term,

6. Car. 1. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

Sir Robert Heath, *Knt. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Drake *againſt* Munday.

CASE 1.

DEBT by the plaintiff as executor to one *Drake*. Upon demurrer the caſe was, By articles indented betwixt the teſtator and the defendant, it was "COVENANTED, granted, "and agreed, and the teſtator covenants, grants, and agrees with "the defendant, that he ſhall have and *enjoy* ſuch a houſe and lands "for ſix years, and that the teſtator will ſufficiently repair the "houſe. *Et in conſideratione præmiſſorum*, it is covenanted, granted, "and agreed betwixt the ſaid parties, and the defendant covenants, "grants, and agrees for him, his heirs, executors, and aſſigns, to "pay to the teſtator, his heirs, executors, and aſſigns, an annual "rent of ninety pounds during the ſaid ſix years, at the Feaſt of "*Annunciation* and *St. Michael.*" Upon this the defendant entered, and the teſtator died; and for ninety pounds arrear for one year after his death the executor brings the action, and declares upon all this matter. And thereupon the defendant demurs.

If a perſon covenants, grants, and agrees, that another ſhall *have and enjoy* ſuch a houſe for a certain time, and the other agrees to pay a ſum annually, it amounts to *a leaſe* with a reſervation of *rent.*

Jones, 231. Cro. Jac. 34. 42. 92. 172. 439. 500. 659. Hob. 35. 1. Roll. Ab. 847. Co. Lit. 47. Moor, 861. Noy, 14. Palmer, 201. Leon. 118. 3. Bulſt. 252. 2. Brownl. 23. Roll. Rep. 397. Wood's Convey. 408. Gilb. Cov. 26. 2. Mod. 80. Shep. Touch. 270. 3. Bac. Abr. 429. 3. Com. Dig. 248. Dougl 27. 1. Term Rep. 735. 2. Term Rep. 739.

HENDEN, *Serjeant, for the plaintiff*, argued, that this is merely in covenant, and ſhall not enure as a rent by way of reſervation; and if it be a covenant, it is due to the executor; and if it be a reſervation, it follows the reverſion, and goes to the heir, and not to the executor: and he moved, that ſo it appears to be the intent of the parties, that it ſhould be only as a covenant, and as a ſum in groſs, otherwiſe the words of the covenant were idle; and he relied upon the 10. *Eliz. Dyer*, 272. 5. b. And the rather it is a covenant, for that *ratione præmiſſorum* he covenants, which refers to more than the covenant, to enjoy the lands, &c.

But ALL THE COURT conceived, that it is merely a rent, and enſues the reverſion, and ſhall go to the heir; for as the words of the covenant and grant, that "he ſhall *enjoy* the land for ſix years," amount to a leaſe, and ſhall bind the heir, ſo the words of the covenant and grant of the leſſee, that "he ſhall pay ſuch a rent annually," amount to a reſervation; and the rather, becauſe he covenants and grants to pay to him and his heirs (*a*). Whereupon rule was given, that judgment ſhould be entered for the defendant; *et quòd querens nihil capiat per billam*, unleſs cauſe were ſhewn to the contrary: and afterwards being moved again, it was adjudged accordingly.

(*a*) *Vide* Browning *v.* Reeſton, Plowd. 131. the Year-Books 21. Hen. 7. pl. 36. the 1. Edw. 6. and Brook's Abr. "Leaſes," pl. 21.

Beamond

CASE 2.

Beamond *againſt* Long.

If BARON and *feme executrix* recover, and the *feme* die before execution, the BARON ſhall not have *ſcire facias*. *Sed aliter* if for a debt due to the *feme*, and not *in autre droit*.

Poſt. 227. 464.
2. Keb. 668.
3. Sid. 29. 337.
6. Mod. 179.
3. Mod. 186. 190.
6. Mod. 179.
Cro. Jac. 323.
Carth. 415.
2. Ld. Ray. 1050.
2. Crom. Pract. 106.
Dougl. 537.

UPON demurrer the caſe was, Huſband and wife, the wife, being adminiſtratrix to her former huſband, brings debt upon a bond of two hundred pounds due to the inteſtate, and had judgment to recover the debt, their damages and coſts. The wife afterwards dies, and a year and a day being paſſed, the huſband brings a *ſcire facias* to have execution. Whereupon it was demurred.

And ALL THE COURT, except HYDE, *Chief Juſtice*, who doubted thereof, conceived, that this *ſcire facias* lies not for the huſband, becauſe, being a debt demanded by the wife as adminiſtratrix, it is *in autre droit*; and although they recover, yet ſhe dying before execution, the duty remains to him who takes new adminiſtration as in right of the inteſtate: and although the huſband is party to the judgment, yet he hath no property in the debt; and he who ought to have the *ſcire facias*, muſt have privity and property to have the debt, otherwiſe it is a vain ſuit (*a*). But if huſband and wife bring an action of debt, for debt due to the wife, and recover, the wife dies, the huſband may bring a *ſcire facias* to execute this judgment; for the debt being recovered, the huſband after the death of the wife ſhall have it, but not in the principal caſe. *Reſiduum poſtea, page* 227. 458. 464.

(*a*) By 17. Car. 2. c. 8. adminiſtrator *de bonis non* may ſue a *ſcire facias* upon a judgment *in autre droit*.—By 29. Car. 2. c. 3. the huſband of a *feme covert* ſhall have adminiſtration.

CASE 3.

Stroud *againſt* Hoſkins.

The ſuggeſtion ordained by 2. *Edw.* 6. c. 13. upon ſuing *prohibition*, muſt be proved by witneſſes where it is matter of fact; but if a *conſultation* be awarded for that defect, another *prohibition* may be granted.

Dyer, 170.
Jones, 251.
Yelv. 102. 119.
2. Show. 92.
Carth 463.
Salk. 554.
2. Inſt. 662.
Cro. Eliz 735.
Moor, 917.
2 Vent. 47.
Pop. 159.
Hob. 286
4 Com. Dig. 516. 518
4. Bac. Abr. 246. 249.
Cowp. 424.

PROHIBITION upon the 2. *Edw.* 6. c. 13. Becauſe he ſues for tithes of heath and barren ground within ſeven years after the improvement. The defendant pleads the 50. *Edw.* 3. c. 4. and that at another time a prohibition was granted, and conſultation thereupon, therefore he ſhall not now have another prohibition. It was ſhewn that the conſultation was not upon the ſubſtance of the prohibition, but becauſe he did not prove by two witneſſes the ſuggeſtion within the ſix months. And it was thereupon demurred.

THE FIRST QUESTION was, Whether by the ſtatute the ſuggeſtion ought to be proved by witneſſes?—And IT WAS RESOLVED, that it ought, becauſe it is a mere matter in fact; and the ſuggeſtion ought to be proved by the intention of the ſtatute, as well as a preſcription *de modo decimandi*, or a diſcharge of tithes, or any other ſuch ſuggeſtion.

SECONDLY, It was reſolved, that the conſultation being granted for not proving the ſuggeſtion by two witneſſes, according to the 2. *Edw.* 6. c. 13. and not upon the ſubſtance of the ſuggeſtion for want of its verity, or for the inſufficiency thereof, it is not within the 50. *Edw.* 3. c. 4.; for that is intended where conſultation is granted upon the ſubſtance of the ſuggeſtion being proved to be inſufficient in verdict or nonſuit after evidence, and not where it is granted for the inſufficiency of the form of the ſuggeſtion, or in the proceeding thereupon. Wherefore it was adjudged for the plaintiff; eſpecially as this caſe is, for that it is a collateral cauſe out of the ſuggeſtion, and no cauſe of conſultation at the time of the ſtatute made.

Sir

Sir William Courtney *againſt* Sir Richard Greenville, Knight. CASE 4.

ERROR to reverſe a judgment in the common pleas in debt. The plaintiff declared, That the defendant, 18 *May*, 4. *Car.* 1. acknowledged himſelf bound to the ſaid *Sir Richard Greenville* in two hundred and eighty pounds, *ſolvendum* upon requeſt, *et profert hic in curiâ ſcriptum prædictum quod debitum prædictum in formâ prædictâ teſtatur, cujus dat. eſt eiſdem die et anno.*

In debt on bond, the omiſſion of *per ſcriptum obligatorium* is aided after *oyer* by a plea "*quod ſolvit*;" and verdict for the plaintiff. Poſt. 288. 363.

The defendant demands OYER *conditionis ſcripti obligatorii prædicti*; which being read, he pleads payment.

And iſſue was joined thereupon; and judgment given for the plaintiff.

18. *Edw.* 4. pl. 8. *Hen.* 7. pl. 71. 1. Co. 45. 7. Co. 25. a. 8. Co. 133. b. 3. Lev. 234. Cro. Eliz. 737. Cro. Jac. 420. Lut. 1667. 6. Mod. 306. Salk. 463. Co. Lit. 303. b. 5. Com. Dig. 59. 244.

The error aſſigned was, Becauſe he doth not declare according to the uſual courſe, *quòd per ſcriptum obligatorium conceſſit*, nor any writing mentioned in the former part of the declaration: ſo it doth not appear to the Court that there was any writing obligatory; and that being faulty in ſubſtance, no plea or verdict may make it good.

But ALL THE COURT were of opinion, becauſe he ſhewed the writing, whereby he demands the debt, and the defendant by his plea ſhews that it is an obligation with a condition, and iſſue is taken thereupon, and found for the plaintiff, that the declaration is good enough; at leaſt it appears to the Court, that the plaintiff hath a juſt debt, and good cauſe to recover. Wherefore the judgment is good, and was affirmed.

Gray *againſt* Fielder. CASE 5.

DEBT on a bond aſſigned by commiſſioners of bankrupts, and doth not ſhew the obligation; wherefore it was demurred.—But becauſe he comes in by act in law, and hath no means to obtain the obligation, IT WAS ADJUDGED to be good enough, without ſhewing it in court; as tenant by ſtatute-merchant, or tenant in dower, ſhall have advantage of a rent-charge without ſhewing the deed.

In debt on bond aſſigned by commiſſioners of bankrupt, *profert* is not neceſſary. Poſt. 442.

10. Co. 94. Cro. Jac. 109. 317. Co. Lit. 225. 3. Wilſ. 3. Dougl. 4. note (1). 1. 5. Co. 75. Term Rep. 149.

And ſee 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16. Poſt. 442.

The Caſe of Sir Miles Hobert and William Stroud, Eſq. CASE 6.

THE ATTORNEY-GENERAL exhibited two ſeveral informations, the one againſt *William Stroud, Eſq.* the other againſt *Sir Miles Hobert, knight.* The charge againſt both of them therein was for ſeveral eſcapes out of the priſon of the Gatehouſe. They both pleaded not guilty, and their caſes appeared to be as followeth:

Every place where a perſon is reſtrained of his liberty is a priſon; but if a perſon be committed to a particular place, and inſtead of confinement within the walls goes at large, he may be indicted for the miſdemeanour, although he had the gaoler's permiſſion. Poſt. 251. Ante, 14. 182.

The ſaid *William Stroud* and *Sir Miles Hobert* were, by the king's command, committed to priſon for miſdemeanor alledged againſt them in their carriage in the houſe of commons at the laſt parliament.

Sir Miles Hobert and William Stroud's Case.

1. Roll. Ab. 808. Hobart, 202. 3. Co. 44. a. Moor, 257. 299. 1. Mod. 116. Hard. 476. 2. Hawk. P. C. 189, 190, 191. 3. Com. Dig. 879. 184.

ment. Afterwards, in *Trinity Term*, 6. *Car.* 1. both of them being by order of this court, and by a warrant from the attorney-general, to be removed to the Gatehouſe, the warden of the *Marſhalſea* (where they were before impriſoned) ſent the ſaid *Stroud* to the keeper of the Gatehouſe, who received him into his houſe, lately built, and adjoining to the priſon of the Gatehouſe, but being no part thereof: after which receipt the ſame night he licenſed the ſaid *Stroud* to go with his keeper to his chamber in *Gray's-Inn*, and there to reſide. *Sir Miles Hobert* was alſo by the ſaid warden of the *Marſhalſea* delivered to the keeper of the Gatehouſe; but being ſick and abiding at his chamber in *Fleet-ſtreet*, he could not be removed to the priſon of the Gatehouſe, but there continued with his keeper alſo. Afterwards the ſickneſs increaſing in *London*, they (with the licence of the keeper of the Gatehouſe, as it was proved) retired with their under-keepers to their ſeveral houſes in the country for the ſpace of ſix weeks, until *Michaelmas Term* then next following, when, by direction of the ſaid keeper, they returned to his houſe. But in all that ſpace it could not be proved that they ever were in any part of the old priſon of the Gatehouſe, but in the new building thereto adjoining, unleſs when they once withdrew themſelves to a cloſe-ſtool which was placed near to the parlour, and was part of the old priſon of the Gatehouſe. This evidence was given to both the ſaid juries, and both of them returned their verdicts ſeverally, that they were *not guilty* according to the informations exhibited againſt them.

And in this caſe it was debated at the bar and bench, Whether by this their receipt and continuance in the new houſe only, it may be ſaid that they ever had been impriſoned?

R. 159. And THE JUDGES HELD, that their voluntary retirement to the cloſe-ſtool made them to be priſoners. They reſolved, that in this and all other caſes, although a priſoner departs from priſon with his keeper's licence, yet it is an offence as well puniſhable in the priſoner as in the keeper. And CALTHROP made this difference betwixt breach of priſon and eſcape: the firſt is againſt the gaoler's will, the other is with his conſent, but in both the priſoner is puniſhable: whereunto THE WHOLE COURT agreed.

The court of king's bench may, by rule of court, appoint the priſon of the Court to be in any part of England. Poſt. 466.—1. Roll. Abr. 810. Strange, 678. 817. 843. See 27. *Geo.* 2. c. 17. For the preſent boundaries of the rules of the king's bench priſon, ſee 3. Term Rep. 583, 584.

IT WAS ALSO RESOLVED, that the priſon of the king's bench is not any local priſon confined only to one place, and that every place where any perſon is reſtrained of his liberty is a priſon; as if one take ſanctuary and depart thence, he ſhall be ſaid to break priſon.

Eaſter

Eaſter Term.

7. Car. I. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Memorandum.

CASE 1.

Mr. Baron Vernon made *Puiſne* Judge of common pleas; and Mr. Juſtice Davenport made Chief Baron.—Mr. Serjeant Weſton called.

IN this Term SIR GEORGE VERNON, one of the Barons of the exchequer, was made *Puiſne Juſtice* of the common pleas, in place of SIR HUMPHREY DAVENPORT, who was made Chief Baron of the exchequer in *Hilary Term* laſt paſt; and JAMES WESTON, of the *Inner Temple*, was, by writ returnable *menſæ Paſchæ*, made a Serjeant, he appearing in chancery *quarto die poſt* of the return, being *Thurſday*; and the *Monday* following, before all the Juſtices of the king's bench and common pleas and Barons of the exchequer (none being abſent), aſſembled at *Serjeants-Inn*, in *Fleet-ſtreet*, performed the ſolemnity, reciting his count, and his robes were there put on; and he made his feaſt in *Serjeants-Inn* for the Juſtices and Serjeants and the king's learned Counſel, and gave rings, according to the uſual manner, afterward, with this inſcription, "*Servus Regi, ſerviens Legi*;" and within two days was made one of the barons of the exchequer.

Flowers' Caſe.

CASE 2.

An action lies for ſaying of a *midwife*, "many "have periſhed "for her want "of ſkill."

Hetley, 72. Cro. Jac. 504. Ld. Ray. 1480. Cowp. 276. 3, Term Rep. 110.

ACTION UPON THE CASE. Whereas ſhe was a midwife, and had uſed that art for divers years, and by that means gained much maintenance for herſelf and family; that the defendant, having communication of her and her profeſſion, ſpake theſe words of the plaintiff, "Many have periſhed for her want of ſkill."—And after verdict, being moved in arreſt of judgment, that theſe words were not actionable, it was adjudged for the plaintiff, for ſhe hath a profitable gain by that function; and therefore thoſe words may be prejudicial.

Helier *againſt* Hundred de Benhurſt.

CASE 3.

The examination upon oath required by the 27. *Eliz.* c. 18. in caſe of hue time of taking Bull. N.P. 186.

Eaſter Term, 6. *Car.* 1. *Roll* 233. *Berks.*

ACTION upon the ſtatute of *Winton*, 13. *Edw.* 1. ſt. 2. ch. 1. for that he was robbed of ſeventy pounds, and made hue and cry, and amends was not made, nor any of the robbers taken: and counts upon the ſtatute of *Winton*, and that he took his oath before

and cry, may be taken by a juſtice *of* the county, though he is not *in* the county at the it, for it is a *miniſterial* act. Jones, 239. 1. Roll. Abr. 538. Leon. 322. Sid. 209. 3. Com. Dig. 477. Dougl. 465.

John

HELIER *against* HUNDRED DE BENHURST.

John Saunders, justice of the peace within the said county of *Berks*, and inhabiting within the hundred, within twenty days before his writ brought that he was robbed, and did not know any of the parties, according to the 27. *Eliz.* c. 13.

Upon not guilty pleaded, a special verdict was found as for the plaintiff according to the declaration; and further, that "he took "his oath before the said *John Saunders*, justice of the peace of the "said county, and inhabiting in the said hundred, at his chamber "in the *Middle Temple*, *London*:" and so concludes, if upon all the matter the Court should adjudge for the plaintiff, they find for the plaintiff; and if, &c. for the defendant.

The main question was, Whether this examination and oath was taken *secundum formam statuti?*

This matter being argued at the bar, it was alledged by the defendant's counsel, that a justice of peace hath only his jurisdiction *within* the county where he is a justice of the peace, and may not elsewhere exercise his jurisdiction; and this examination is as justice of the peace of the county where the same fact was done. The 27. *Eliz.* c. 18. appoints the oath and examination to be taken by justices of the county inhabiting in or near the hundred (*a*); and what he doth out of the county is *coram non judice:* and for that purpose were cited 13. *Edw.* 4. *pl.* 9. and *Plowd.* 32. *Plat's Case*, that a justice of peace cannot exercise his jurisdiction out of his county, to commit any felon.

(*a*) 2. Hawk. ch. 12. p. 117. 1. Hale P.C. 581. 2. Hale P.C. 51.

The Court will judge from the *special matter* found by a jury, although they first find a *general verdict* according to the issue. Ante, 76.

But LITTLETON and GRIMSTON, *for the plaintiff*, moved, that this verdict finding, that he took the examination according to the form of the statute, and so a general verdict at the first, the finding, after this special matter, is not to purpose; as the case of *Sir Rowland Heyward*, *Assumpsit*, the jury find a general verdict according to the issue, and a special matter against it, the last is void.—But THE COURT took not any regard to this reason; for the matter in law being found, the Court shall adjudge according to it.

Hob. 53. Cro. Eliz. 459. 481. Cro. Jac. 55. Dyer, 115. 370. 2. Roll. Ab. 695. 1. Term Rep. 141. 2. Term Rep. 666.

A justice of the peace cannot exercise any *jurisdiction* or do any *judicial act* out of the borough or county for which he is appointed. Dalton, c. 24. 1. Hale, 581.

SECONDLY, They moved for the matter, that the examination is well taken in *London*; for the statute doth not appoint that it shall be taken *in* the county, but by a justice of the peace *of* the county inhabiting in or near the hundred, &c. and that within twenty days before the writ brought, because he will by intendment be more careful in the examining, he being partaker of the burthen, if it should be recovered against the hundred; and he is to examine as well concerning the robbery, as whether he knows any of the persons who robbed him. And they said, that of these matters, in whatsoever place he be, he may take cognizance and examination; and that they had seen a report, 8. *Jac.* 1. that a justice of peace taking a recognizance out of the county, it was good enough: for which, &c.

And it being moved again, ALL THE JUSTICES agreed, that he is said to be a justice of peace inhabiting in the hundred, where his wife, family, and himself, are usually *commorant*, although in the Term time he be at *London*.

But HYDE, *Chief Justice*, and WHITLOCK, conceived at first, that the examinations cannot be taken out of the county, because it is out

(*a*) See 9. Geo. 1. c. 7. s. 12. of

HELIER against HUNDRED OF BENHURST.

of his jurisdiction where he is justice of peace, for their jurisdiction is private; but justices of the king's bench may take such examinations or exercise jurisdiction in any place, for their authority is general: and compared it to the Case where two justices of peace, upon the 18. *Eliz.* c. 4. set down an order for the keeping of a bastard, it cannot be done by them out of the county; also by the 5. *Eliz.* c. 4. of Labourers, orders of justices of peace ought to be by them which are inhabitants in the county, and when they be in the county, and not to be made by them out of the same: and therefore because it was taken out of the county, they held it was ill.

2. Hawk. c. 8. f. 29. 3 Bac. Abr. 294. 3. Term Rep. 38, 380.

But JONES and MYSELF conceived, that this examination and oath, although found to be taken in *London*, he being a justice of peace of the said county, and inhabiting in the hundred, is a person whom the statute appoints and authorises to take examinations; and that being taken by him who by intendment will have strict care to the examination, because himself may be liable to part of the charge, it is not material where it is taken. And it is not any act of exercising jurisdiction, but rather a direction that such oath and examination shall be taken before such a person; as if it were appointed that such an oath shall be taken before some knight or judge inhabiting within the hundred, that is not any point of jurisdiction, but a description of the person before whom the examination shall be taken, and which may be as well taken in any other place as in the county; and therefore it was said, that there is difference where a justice of peace doth an act to compel another to perform, as to imprison any for non-performance, or to command one for any offence to be imprisoned; such acts cannot be done in any place but where his jurisdiction extends: but it is an usual course for justices of peace to take informations against offenders in any place out of the county, to prove offences in the county where they are committed; and sometimes they take recognizance to prosecute, and such recognizances taken out of the county by voluntary assent of the parties bind well enough, and are usual; but they cannot compel any out of the county to enter into a recognizance, for they cannot use coercive power out of the county. Whereupon THE COURT would advise.

But a justice of the peace may take a mere examination out of his borough or county relating to an act done in it, for it is not an act of jurisdiction.

Caldecott's Cases, 156. 2. Hale, 47. Stra. 1154. Dougl. 791.

Afterwards this Case being propounded at the table in *Serjeants-Inn* to THE CHIEF BARON, and to BARON DENHAM, BARON TREVOR, BARON WESTON, and to JUSTICE HARVEY, and *I* propounding it to JUSTICE HUTTON, they all, after advice, agreed, that this examination taken in *London* by a justice of peace of the county inhabiting in the hundred, though at that time he were out of the county, was good enough; and JUSTICE WHITLOCK afterwards agreed thereto, because it was not an act of jurisdiction, but only matter of examination to enable the plaintiff to his action. Whereupon afterwards, by the assent of HYDE, *Chief Justice*, judgment was given for the plaintiff.

In the 47. *Ass. pl.* 11. justices of assise take verdicts in other counties. 1. *Hen.* 6. *pl.* 3. distress may be driven into another county, &c. And in the 27. *Eliz.* in the common pleas, in the Case of *Charren v. Barnes*, a bishop of *Ireland*, being in *England*, committed administration of the goods of one who died intestate within his diocese in *Ireland*, and adjudged good,

Case 4.

Flower *againſt* Elgar.

An *audita querela* lies againſt a plaintiff on his *releaſe* of a judgment, although he has taken execution by *elegit*, and aſſigned it over.

AUDITA QUERELA. Upon demurrer the Caſe was: One recovers in debt, and takes execution by *elegit*, whereupon the defendant's lands were *extended*, and after aſſigned over, and ſo conveyed from one to another into ſeveral hands; and afterwards the plaintiff in the action releaſed all ſuch judgment and executions; and now the defendant brings an *audita querela*: and all this matter was ſhewn in the writ.

S.C. Jones, 238. 2. Roll. Ab. 307. 2. Roll. Ab. 402. 2. Vern. 50.

Thereupon it was demurred, Becauſe the writ is brought againſt the firſt plaintiff, who did recover, where he had diſmiſſed himſelf of all the intereſt of *the extent*, and it ought to have been brought againſt *the aſſignee* of the *extent*.

But, notwithſtanding, THE COURT adjudged, that the *audita querela* was well brought; for he being party to the judgment, his releaſe hath diſcharged the judgment.

Case 5.

Fawkener *againſt* Bellingham.

Ante, *Page* 80.

The ſtatute 1. *Edw.* 6. c. 14. which gives all chantries, rents, &c. which within five years had been paid for the perpetual maintenance of prieſts, to the king, makes no alteration in the nature of *old rents*, and *they* are therefore, as before, within the limitation of 32. *Hen.* 8. c. 2.

ERROR to reverſe a judgment in the common pleas, was argued divers times at the bar; and now this Term at the bench, the error aſſigned in point of law.

All the Juſtices, *viz.* HYDE, JONES, WHITLOCK, and MYSELF, argued in one day, and delivered our opinions in order, that this judgment is erroneous, and ought to be reverſed; for we all conceived, it was the ſame rent as before, and not a new rent begun by the ſtatute, but changed by operation of law from a rent ſervice to a rent ſeck: nor is it a new rent given by the ſtatute, becauſe it doth not appoint any certainty of rent, but refers, that ſuch a rent as the lords thereof had before, they yet ſhall have, ſuch in quantity, ſuch in eſtate.

JONES ſaid, that if he had recovered this rent before the ſtatute in an aſſiſe, and after the ſtatute had been diſſeiſed again, he ſhould have had a re-diſſeiſin, which ſhews that it is the ſame rent.

2. Roll. 50. 8. *Vide* S. C. ante, 80. Hetl. 26. 36. 44. Jones, 233. Co. Lit. 268. Moor, 31. Co. 64. b, 3, Lev, 21. 1. Vern. 195.

The ſtatute of limitations may be pleaded in *avowry* for a rent ſervice created by ſtatute. *Ante*, 81.

Jones, 233. 8. Co. 64. Lit. Rep. 42. Hetl. 28, 36.

And JONES and HYDE conceived, if rent be given by the ſtatute, and no limitation of a diſtreſs therein, it is a rent ſeck, and there cannot be a diſtreſs for that rent: but here it is agreed on every part, that to this rent there belongs a diſtreſs; and the reaſon is, becauſe a diſtreſs belonged to this rent before, ſo being changed the diſtreſs belongs to it. And it is expreſsly within the letter and intent of the ſtatute, that no avowry ſhall be made for rent unleſs there hath been ſeiſin thereof within forty years; and it doth not appear but that this rent might be loſt, for want of ſeiſin, before the 1. *Edw.* 6. c. 14.: and as the 32. *Hen.* 8. c. 2. bars to claim it unleſs he hath had ſeiſin within forty years, ſo the 1. *Edw.* 6. c. 14. doth not alter it, nor give more liberty thereto than it had before; and therefore, if it ſhall be ſaid to be rent created by the ſtatute, it ought to appear by the ſtatute what the rent is in ſpecial

which

which is created by the ſtatute; but that doth not appear, and therefore it is the ſame rent which was before, of which the beginning is not known, whereof ſeiſin ought to have been within forty years. FAWKENER *againſt* BELLINGHAM.

JONES thereupon put this caſe: Lord and tenant by rents and ſervices; if the tenant by licence at this day make a feoffment by *indenture*, to hold of him by the ſame ſervices as he holds over; in avowry for this rent, there ought to be ſeiſin within forty years, for it is not a rent of certainty newly created, but refers to the ancient tenure, which ought to be ſhewn and ſeiſin proved; but if he create a rent certain, it is otherwiſe. And there is difference, as all the Juſtices held, where the ſaving is of all the rents, for that *nihil certi implicat*, and where it is a ſaving of a particular rent to certain perſons; and it would be a great miſchief if there ſhould be ſuch an expoſition, that rents generally ſaved by the ſtatutes ſhould be out of the ſtatute of limitation: wherefore they all concluded upon the point in law, that this plea, that he was not ſeiſed within forty years, &c. was good, and the judgment given for the defendant, erroneous.

The 32. *Hen.* 8. c. 2. of limitations may be pleaded to an avowry for a rent under a feoffment made to hold by the ſame ſervices as the tenant holds.

5. Com. Dig. 528.

Moor, 31.

But WHITLOCK and HYDE conceived, that the avowry is ill, becauſe it is ſaid that *ultimus preſbyter* was ſeiſed of the land holden *jure preſbyteratûs*, whereas none can be ſeiſed *in jure del prieſthood*, which is his office, but *in jure cantariæ* only. And to that point the other Juſtices ſpake not; but upon the point in law they all agreed, that the judgment ſhould be reverſed.

Where it cannot be alledged that a man was ſeiſed *jure preſbyteratûs* it ought to be *jure cantariæ*.

Ante, 80.—2. Lev. 68. 1. Vent. 223. Plow. 503.

Trinity Term,

7. Car. I. In the King's Bench.

Sir Nicholas Hyde, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*

Sir Robert Heath, *Knt. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE I.

Ward *againſt* Uncorn.

An award that the parties ſhall execute mutual releaſes of all actions, ſuits, and demands, before ſuch a *day*, is good, though *that day* is *the day before* the date of the ſubmiſſion; for it ſhall not be intended that any *new* controverſy aroſe on the intervening day.

1. Roll. Abr. 24. Cro. Jac. 525. 577. 584. Cro. Eliz. 839. 858. 2. Mod. 227. 3. Lev. 58. 6. Mod. 34. 1. Salk. 75. 3. Com. Dig. 385. 1. Bac. Abr. 142. Kyd on Awards, 113.

DEBT for ſeventy-two pounds. Whereas the plaintiff and defendant, 29. *Dec.* 6. *Car.* 1. ſubmitted to an award of all actions, ſuits, and demands betwixt them, to be arbitrated by *J. S.* and *J. D.* ſo that they made their award by indenture before the 6. *January* next following; and ſhews, that they, upon the 5. *Jan.* by indenture made their award upon the premiſes, and thereby awarded 72l. to be paid by the defendant to the plaintiff, and that each of them before the 12. *January* following ſhould make a releaſe from one to another of all actions, ſuits, and demands, before the 28. *December* laſt paſt; that for not paying this 72l. the plaintiff brings this action. The defendant pleads *nil debet*; and found for the plaintiff.

GERMYN moved in arreſt of judgment, that this arbitrament is void, becauſe they did not determine all controverſies to the time of the ſubmiſſion; for they appoint a releaſe to be made of all actions and demands until the 28. *December*; ſo the 28. *December* is one day before, and there might divers cauſes of action ariſe after the 28. *December*; and the arbitrament made the 5. *January* recites, that actions and controverſies were then depending: wherefore this arbitrament was void, and the plaintiff ought not to have judgment.

WHITFIELD, *è contra*: for they recite, in their award, that they made their arbitrament *de et ſuper præmiſſis*; ſo it ſhall not be intended that any new cauſe of action aroſe upon the ſaid 28. *December*, unleſs it be ſpecially ſhewn. And when they ſay they made an award *de et ſuper præmiſſis*, it ſhall be intended that they made an end of all things ſubmitted unto them (and which were notified unto them), unleſs the contrary be ſpecially ſhewn. And this releaſe ſhall diſcharge all matters, although they were depending in ſuit the 29. *December*, being the day of ſubmiſſion, they ariſing for cauſes before: and for that he relied upon *Baſpole's Caſe*, 8. *Co.* 97. and cited the Caſe of *Barnes v. Greenway* (*a*), where a ſubmiſſion made the 4. *December* of all matters and controverſies betwixt them, and the award was of 60l. to be paid in ſatisfaction of all cauſes and matters until the 3. *December*, and ſo excludes one day before

(*a*) Cro. Eliz. 838.

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the ſubmiſſion, and for this cauſe exception taken and yet adjudged good; for it ſhall be intended a final determination of all cauſes, and there ſhall not be ſuppoſed that any cauſe did newly ariſe the 3. *December*, unleſs it be ſpecially ſhewn: ſo here, &c. for which, &c.

WARD *againſt* UNCORN.

ALL THE COURT was of this opinion; for when he ſaith they made an award *de et ſuper præmiſſis*, and it doth not appear to the Court by any ſpecial ſhewing that there is any cauſe newly ariſen upon the ſaid 28. *December*, the Court will not conceive any; therefore the award is well made, eſpecially when he takes iſſue, that *nullum tale fecerunt arbitrium*, or *nil debet*, which is all one as this caſe is. Whereupon a rule was given, that judgment ſhould be entered for the plaintiff, unleſs cauſe ſhewn, &c.

Cro. Jac. 578. Hob. 190. Cro. Eliz. 353. Stra. 1024.

Flower *againſt* Baldwin.

CASE 2.

Hilary Term, 4. *Car.* 1. *Roll* 687.

TRESPASS. Upon a ſpecial verdict the caſe was: One bargains and ſells by indenture on the 8. *July* 20. *Jac.* 1. The deed is acknowledged the 10. *July* before a maſter in chancery. The 9. *October* following the bargainor ſuffers a judgment in the common pleas. The 18. *October* the indenture is inrolled (*a*) in chancery. Iſſue was joined, *viz.* Whether the bargainor was ſeiſed in fee at the time of this judgment?

A bargain and ſale, when inrolled within the ſix months, relates to the ſealing of the deed ſo as to avoid incumbrances to ſtrangers; *ſed quære*, If it ſhall avoid a judgment ſuffered by the bargainor before it is inrolled? *Vide* poſt. 569. 2. Inſt. 674. Co. Lit. 147. 186. a. Cro. Jac. 53. Moor, 776. 2. Com. Dig. 541. 3. Com. Dig. 267.

LITTLETON, *for the plaintiff*, argued, that the indenture being inrolled ſhall have relation to the time of the ſealing and delivery thereof, and make the bargainee ſeiſed *ab initio*, and then the bargainor was not ſeiſed at the time of the judgment; and for that he relied upon 8. *Edw.* 6. *Bro.* "*Inrollment de Faits*," 9. where two joint-tenants, the one bargains and ſells by indenture, the other dies before inrollment, and the inrollment is within the ſix months, the moiety only ſhall paſs, for the deed intended to paſs but the moiety. And *Co. Lit.* 147. *b.* If, after the bargain and ſale, the bargainor and bargainee join in a grant of a rent charge, and the deed is inrolled within ſix months (*b*), it is the grant of the bargainee, and confirmation of the bargainor. And if bargain and ſale be of a manor and an advowſon appendant, and the church become void before the inrollment, the inrollment being within the ſix months, the bargainee ſhall have the benefit of this preſentation, and of all arrears of rents incurred before the inrollment, it being within the ſix months. So if a bargainee hath a wife and dies, and afterward the deed is inrolled, the wife ſhall have dower, as it was reſolved for the wife of *Baron Frevill*; and in the Caſe of *Gawen v. Stacy* (*c*) it was adjudged, that if the bargainee grant a rent out of the land before inrollment, and afterwards it is inrolled, the grant is good.

(*b*) 2 Inſt. 674. 6. Co. 62. Hob. 240. Dyer, 282. Salk. 413. 6. Mod. 260. Poſt. 569.

(*c*) 1. Roll. Rep. 424.

CHARLES JONES, *for the defendant*, argued, that until inrollment, the poſſeſſion and freehold continues in the bargainor, and nothing deveſts out of him; for the ſtatute 27. *Hen.* 8. c. 16. is expreſs, that nothing ſhall paſs until inrollment, ſo that until the inrollment he remained ſeiſed; then the inrollment not being

Poſt. 284.

(*a*) *Vide* 27. *Hen.* 8. c. 16. and 29. Car. 2. c. 3.

FLOWER against BALDWIN.

the 18. *October*, and the judgment being the 9. *October*, and the iſſue being, Whether he were ſeiſed in fee the ninth of *October*? upon this ſpecial verdict the iſſue is found for the defendant: which is the reaſon, in *Hind's Caſe* (*a*), that if a bargainor make a feoffment or levy a fine before the inrollment to the bargainee himſelf, and afterward the deed is inrolled, the bargainee is in by the fine or feoffment; but the inrollment ſhall take away all incumbrances made by the bargainor himſelf to a ſtranger, that they ſhall not prejudice the bargainee, for the inrollment hath relation to take away all incumbrances.

ALL THE COURT agreed, that the inrollment of the deed within the ſix months relates to the ſealing of the deed, and makes the bargainee in, to avoid all incumbrances made to ſtrangers after the ſealing.

Hob. 165.

But JONES, *Juſtice*, conceived, that *in rei veritate* the bargainor ſhall be ſaid to be ſeiſed always until the inrollment, and nothing paſs to the bargainee until the inrollment; for it is ſo expreſsly

2. Inſt. 674.

appointed by the ſtatute; and it is *quaſi conditio præcedens*, and until it be performed nothing veſts in the bargainee. And he cited the Caſe of *Bellingham v. Alſop*, (*b*) that if a bargainee before inrollment

Ante, 100.

bargain the land to any other, and after the firſt deed is inrolled, and afterward the ſecond bargain and ſale, and both of them within the ſix months, the ſecond bargain and ſale is void, becauſe there was nothing in him at the time of the bargain and ſale. And therefore HE and HYDE, *Chief Juſtice*, inclined (as this Caſe was, and the iſſue joined and found) for the defendant.

But *I* was of opinion, that when the inrollment is within the ſix months, he is in *ab initio*, and the fee veſts in the bargainee *ab initio*; for the ſtatute of 27. *Hen.* 8. c. 16. executes the poſſeſſion to the uſe; but that is ſtopped until the deed be inrolled within the ſix months, and when the deed is inrolled it veſts in him *ab initio*, and the poſſeſſion is expectant to the uſe at the time of the ſealing of the deed; and until the deed inrolled the bargainee hath election whether he will take it by the deed or not; which is the reaſon, that if he himſelf in the *interim* take an eſtate by feoffment

See Sanders on Uſes and Truſts, 434.

or fine, he himſelf deſtroys the uſe, and takes by conveyance at the common law and not by the uſe; but when he himſelf doth no act of diſturbance, and the inrollment is within the ſix months, it ſhall relate to the date of the deed; and that is the reaſon he ſhall have all rents incurred in the mean time, and the benefit of preſenting to churches when they fall, and ſhall be ſaid ſeiſed *ab initio*; and then the bargainee is ſeiſed the ſaid ninth day of *October*, being the day of the judgment, and not the bargainor, &c.

THE COURT, thereupon, would further adviſe.

(*a*) 6 Co. 71. a. (*b*) Cro. Jac. 52.

Atkey

Atkey *againſt* Heard.

CASE 3.

TROVER AND CONVERSION of goods of the inteſtate's. The time of the converſion being ſuppoſed after the adminiſtration committed, on verdict being found againſt the plaintiff, the queſtion was, Whether the plaintiff ſhould pay coſts?—And IT WAS RESOLVED, that this action, being grounded upon the *converſion* in his own time, and not in the time of the inteſtate, was as his own proper action; wherefore he ſhould pay coſts.

In trover by an adminiſtrator, if the *converſion* be in his *own time*, he ſhall pay coſts. Ante, 29. S.C. Jones, 241. v. Kynaſton,

3. Levinz, 60. 375. 6. Mod. 93. 2. Com. Dig. 549. Cowp. 371. *Sed vide* Cockerill 4. Term Rep. 277. *Eaſter*, 31. *Geo.* 3.

Taylor *againſt* Willes.

CASE 4.

Trinity Term, 5. *Car.* 1. *Roll* 1204.

ERROR upon a judgment in *Exeter*, in an action on the caſe upon an *aſſumpſit*, That in conſideration the plaintiff *Willes* would deliver two hundred and a quarter of woad, the defendant *Taylor* aſſumed to pay as much as it ſhould be reaſonably worth; and upon another conſideration aſſumed to do another act. *Taylor* pleaded *non aſſumpſit*. The jury find *quòd aſſumpſit*, and aſſeſs for damages thirty-three pounds ſix ſhillings eight-pence, *to be paid in dyeing, if by law it may be*, and aſſeſs for coſts ſix ſhillings eight-pence. The judgment given was, that he ſhould recover the thirty-three pounds ſix ſhillings eight-pence for damages aſſeſſed by the jury, and the coſts; upon which a writ of error was brought.

To ſeveral counts in *aſſumpſit* on ſeveral promiſes, "*non aſſumpſit*" generally is good. 2. Roll. Abr. 695. Cro. Jac. 544. 681. 1. Sid. 333. 292. March. 100.

GERMYN, *for the plaintiff* in the writ of error, aſſigned for error, FIRST, That the verdict is ill, Becauſe they find generally *quòd aſſumpſit*, and do not divide them, being ſeveral.—*Sed non allocatur*: for if they were upon ſeveral promiſes, yet "*non aſſumpſit*" generally is good; and the verdict ſo general is good.

SECONDLY, Becauſe it was found, that the damages of thirty-three pounds ſix ſhillings eight-pence are to be paid in dyeing, if by law it may be.—*Sed non allocatur*: for the finding the *aſſumpſit* is good enough, and ſo was the aſſeſſing damages to thirty-three pounds ſix ſhillings eight-pence; but that which is found after is void; and the judgment omitting that which was void, is good enough. The judgment was therefore affirmed.

In *aſſumpſit*, if the jury find for the plaintiff, and aſſeſs damages "*to be paid for in* "*dyeing*," theſe words ſhall be rejected as ſur- Cro. Eliz. 480.

pluſage. Ante, 76. 130. 174.—2. Roll. Ab. 695. Moor, 431. 1. Leon. 92. 2. Saund. 308. Savil, 112. 2. Lev. 253. Hob. 117. 5. Bac. Abr. 298. Dougl. 667.

Mariot *againſt* Kinſman.

CASE 5.

Michaelmas Term, 5. *Car.* 1. *Roll* 38.

DEBT upon an obligation. The defendant demands *oyer* of the condition, which was, WHEREAS he had taken *A. S.* a widow, to wife, being poſſeſſed of divers goods, if he ſhould permit his ſaid wife to make a will, and to diſpoſe in legacies as much as ſhe would not exceeding fifty pounds, and pay and perform what ſhe appointed, ſo that it did not exceed fifty pounds, that then, &c.

A *will* made by a *feme covert* purſuant to a covenant of her huſband's for that purpoſe, will bind him as an *appointment*.

The defendant pleads, that ſhe did not make any will.

Ante, 204. Poſt. 376. 597.—1. Mod. 211. 2. Mod. 172. 11. Mod. 221. 12. Mod. 288. Perk. 501. Cro. Eliz. 27. 1. Vern. 244. 408. 2. Vern. 329. Prec. Ch. 44. 84. 255. 2. Wilſ. 82. Ld. Raym. 515. Salk. 235. 2. Bac. Abr. 49. and the Caſes there cited, 2. Com. Dig. 156. 3. Term Rep. 618. Stra. 891. 1111.

MARIOT *againſt* KINSMAN.

The plaintiff takes iſſue thereupon; and it was found, that ſhe made *a will*, and thereby diſpoſed of divers legacies not exceeding the ſum of fifty pounds; but that ſhe was *covert* at the time of the will making, &c.

Gilb. Dev. 12.

IT WAS ADJUDGED for the plaintiff; for although ſhe, being a *feme covert*, could not in law be permitted to make a will to diſpoſe of any goods without the huſband's aſſent, yet it is a will within the intent of the condition; for it was the intent of the condition that ſhe ſhould make a will to that purpoſe notwithſtanding the *coverture*; and it is but her appointment, which the huſband by his obligation is bound to perform, for which the finding that ſhe was a *feme covert* is not material. Whereupon a rule was given, that judgment ſhould be for the plaintiff, unleſs other matter was ſhewn, &c.

See Sanders on Truſts, 531.

CASE 6.

Drake's Caſe.

The court of high commiſſion prohibited in a ſuit for alimony. Ante, 114.

Cro. Jac. 364.

PROHIBITION to ſtay a ſuit in the ſpiritual court before the commiſſioners eccleſiaſtical for ALIMONY; where *the libel* ſuppoſeth divers particular cruelties uſed upon the wife, for which ſhe was enforced to depart; and that the huſband would not allow her any maintenance, and therefore ſhe ſued before the eccleſiaſtical commiſſioners for *maintenance*.—And becauſe it is a ſuit properly ſuable before the ordinary, wherein if there be any wrong, the party grieved may have an appeal; and although this is one of the articles whereby authority is given them by the commiſſion to hear and determine, yet becauſe it is not any of the cauſes which are within the 1. *Eliz.* c. 1. ſ. 18. (*a*) for which cauſes the commiſſion is ordained, the Court awarded a prohibition *ex motione* LAURENTII HYDE, *militis*.

(*a*) Repealed 16. Car. 1. c. 11. ſ. 3.

CASE 7.

Rockey *againſt* Huggens.

Trinity Term, 4. *Car.* 1. *Roll* 764.

A cuſtom that a copyholder *for life* may cut down and ſell timber-trees at pleaſure is unreaſonable and void; but perhaps ſuch a cuſtom may be good for a copyholder *of inheritance*.

EJECTMENT. Upon a ſpecial verdict the Caſe was, A copyholder for life pretending a cuſtom in a manor, that he may cut down and ſell elms growing upon his copyhold; and the lord, pretending that there was no ſuch cuſtom, or, if there were, that it was void and againſt law, enters for a forfeiture, and makes the leaſe to the plaintiff: the copyholder re-enters; and upon not guilty pleaded, the jury found, that the land was copyhold for life, and that he cut down elms, being timber-trees, and ſold them; and found the cuſtom of the manor as the copyholder pretends.

And, Whether it were a good cuſtom or not? was the queſtion.

Jones, 245. 1. Roll. Ab. 560. 650. 660. Moor, 392. 4. Co. 31. Cro. Eliz. 292. 361. 498. Cro. Jac. 30. Noy, 2. 1. Buſt. 50.

It was oftentimes argued at the bar by GERMYN and BRAMPSTON, *Serjeants*, *for the plaintiff*, and by ROLLE and CHARLES JONES *for the defendant*.

And now this Term ALL THE COURT reſolved for the plaintiff; for this cuſtom found is a void and unreaſonable cuſtom, and not allowable by law, that a copyholder for life may cut down and ſell timber-trees, and diſpoſe of them at his pleaſure; for it is in deſtruc-

6. Mod. 94. 2. Com. Dig. 513. 523. Co. Lit. 61. a.

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tion of the inheritance, and againſt the nature of a copyholder for life. But peradventure there may be ſuch cuſtom for a copyholder of inheritance, that being only to the prejudice of him and his heirs; and when he hath *quaſi* an inheritance in the copyhold, he hath ſo likewiſe in the trees growing thereupon. But a copyholder for life hath but a particular eſtate in the land, and ſo he hath in the trees; and it is unreaſonable that he ſhould cut down, fell, and deſtroy the inheritance, and it would be to the great prejudice of thoſe who ſucceeded, for they ſhould not have to maintain the houſe and the plough. ROCKEY *againſt* HUGGINS.

And although it was urged at the bar, that it being found to be the cuſtom, the Court ſhall not adjudge it ill and unreaſonable, when it may have reaſonable beginning; for as leſſee for life may be without impeachment of waſte, ſo it may be here, that the lord granted it at the beginning with this liberty, and the lord by that means might have the greater fine upon the granting of the copyhold; and this copyhold being by intendment always in the hands of particular tenants, it may be ſuppoſed that they planted and nouriſhed them, and therefore ſhould have the greater liberty to cut down and diſpoſe of them.

But THE COURT held, that theſe reaſons will not maintain this cuſtom; for leaſe for life or years, without impeachment of waſte, ought to be begun by deed, and without deed is not good: and it is againſt the nature of the eſtate of a copyholder, that he ſhould do acts in deſtruction of his eſtate; therefore cuſtoms which maintain them ſhall be allowable, but not *è converſo*. And a precedent was ſhewn to the Court, *Powell v. Peacock* (*a*), where ſuch a cuſtom was pleaded in treſpaſs, and adjudged it was not good. (*a*) Co. Cop. 85. 1. Roll. Ab. 562.

And I myſelf have ſeen the report of the caſe of *Rowles v. Maſters* (*b*), upon a ſpecial verdict in an ejectment, which was adjudged in *Trinity Term*, 10. *Jac.* 1. where the cuſtom of *Beauminſter* was that a copyholder for life might nominate his ſucceſſor, and ſo *in perpetuum*, &c. that ſuch a copyholder might cut down and ſell timber-trees; all the Juſtices argued, that where ſuch a copyholder hath the inheritance, and where his ſucceſſor comes in by his nomination (whom by intendment he would not prejudice), there ſuch a cuſtom might be good. But they all agreed, ſuch a cuſtom for a copyholder for life to cut down and ſell trees, was not good; and they there cited the caſe of *Powell v. Peacock* to be ſo adjudged, and to be good law.—And ſo ALL THE COURT here held, that this cuſtom found is void and unreaſonable. Whereupon it was adjudged for the plaintiff. *Vide* 14. *Edw.* 3. "*Barr.*" 77. 21. *Hen.* 7. *pl.* 40. 11. *Hen.* 7. *pl.* 14. 9. *Hen.* . *pl.* 4. "*Waſt*," 59. (*b*) 1. Roll. Ab. 56. 2. Brownl. 85. 192. W. Ent. 449.

(*a*) Cro. Jac. 29. Jones, 245. (*b*) 1. Brownl. 132.

Congham *againſt* King.

CASE 3.

Hilary Term, 6. *Car.* 1. *Roll* 114.

COVENANT againſt the defendant as *aſſignee* of an *aſſignee*, for not repairing of an houſe let *inter alia*. On a demiſe to *A.* of ſeveral parcels of land with a covenant on the part of the leſſee to repair the part of the *aſſignee*.

The defendant takes iſſue upon the mean aſſignment of the leaſe laid in the declaration.

If the leſſee aſſign all his eſtate in parcel of the land demiſed, and the aſſignee do not repair, the original leſſor may bring an action on the covenant againſt the *aſſignee* to him aſſigned.

WRIGHT,

CONGRAM *against* KING.

WRIGHT, after verdict for the plaintiff, took divers exceptions to the declaration in arreſt of judgment, that the plaintiff ſhews the leaſe to be to *J. S.* and by him deviſed to *J. D.* and made *J. N.* his executor, and that he *virtute legationis* entered and aſſigned to *W. S.* and he entered and aſſigned one houſe, parcel of the premiſes, to the defendant, who entered and made ſpoil in an hall and chamber, parcel of the demiſed premiſes, &c. One exception was, Becauſe he ſhews that the deviſee entered and was poſſeſſed *virtute legationis*, and doth not ſay, that the executor aſſented.—*Sed non allocatur:* for being alledged, that he thereof was poſſeſſed *virtute legationis*, and iſſue being taken upon a collateral matter, it ſhall be intended that he entered with the aſſent of the executor.

8. C. Jones, 245. 1. Roll. Ab. 522. Dougl. 187-461. 1. Roll. Ab. 234. b 4. Ld. Raym. 800.

In covenant, a breach aſſigned in ſuch a houſe parcel of the *premiſes*, it ſhall be intended in the lands *demiſed*.

Another exception was, Becauſe the breach was aſſigned in ſuch an houſe parcel *præmiſſorum*, and doth not ſay *præmiſſorum prædimiſſorum*, and to him aſſigned; for in the leaſe are divers things excepted, and it may be that this is parcel of the things excepted, or not parcel of the premiſes aſſigned.—*Sed non allocatur:* for *præmiſſa* ſhall be intended *prædimiſſa et aſſignata*, and ſhall not be extended to any lands not *dimiſſa*.

11. Co. 51. a.

Covenant will lie againſt an aſſignee *of part* of the thing demiſed.

The next exception alledged was, That the defendant is but aſſignee of parcel of the things demiſed; and then he is not chargeable with this covenant, no more than the aſſignee of parcel ſhall be charged in debt for the rent; but the action lies againſt the firſt leſſee, as it is held *Walker's Caſe* (*a*).—*Sed non allocatur:* for this covenant is dividable, and follows the land, with which the defendant, as aſſignee, is chargeable by the common law, or by the ſtatute of 32. *Hen.* 8. c. 37. Whereupon it was adjudged for the plaintiff.

1. Roll. Ab. 922. 5. Co. 16. b. Wood's Convey. p. 426. 1. Saund. 230. 2. Com. Dig. 222. 3. Term Rep. 593.

(*a*) 3. Co. 23.

CASE 9.

A huſband may releaſe *coſts* given to his wife by the ſpiritual court for defamation; but he cannot releaſe the *ſuit*.

A FEME COVERT ſues in the ſpiritual court (without her huſband, as ſhe may) for defamation; and ſentence for her, and coſts aſſeſſed. In appeal of this ſentence to THE ARCHES, the defendant pleads there the releaſe of the huſband as well for the ſentence as for the coſts, which was there diſallowed. Whereupon he prayed a prohibition.

1 Roll. Rep. 426. 2. Roll. Ab. 298. Wood's Inſt. 63. Strange, 576.

For it was alledged, that as a wife may ſue, ſo the huſband may releaſe, and that being releaſed is to be guided according to the common law.

But THE COURT conceived, that the releaſe of the huſband cannot be a bar to this ſuit *quoad reformationem morum:* for the wife being ſcandalized, may ſue in the ſpiritual court to be repaired therein; and the Court may ſentence the defendant to a ſubmiſſion or corporal ſatisfaction, which the huſband cannot releaſe; but for the releaſe of the coſts, the huſband may well do it. Whereupon rule was given, if cauſe were not ſhewn at a day, &c. that a prohibition ſhould be awarded to ſtay the ſuit *quoad* the coſts.

Sir William Maſham *againſt* Bridges.

CASE 20.

ACTION ON THE CASE FOR WORDS. Whereas he was a juſtice of peace of the county of *Eſſex* by virtue of the king's commiſſion for the ſpace of ten years; that the defendant, the firſt of *January*, 6. *Car.* 1. ſpake of him, being then juſtice of peace of the ſame county, "*Sir William Maſham* is but an half-eared juſtice, "he will hear but on one ſide." After verdict, upon not guilty pleaded, and found for the plaintiff,

To ſay of a juſtice that he is but "*half-eared*," and "*will only hear on one ſide*," is actionable; and an allegation that he has been in the *king*'s commiſſion longer than *the king has reigned*, is ſurpluſage. Ante, 14.

JONES moved in arreſt of judgment, that he hath alledged he was juſtice of peace by virtue of the king's commiſſion for ten years laſt paſt, which cannot be, for the king hath not reigned ſo many years; ſo it is impoſſible and contrary in itſelf; and without ſhewing that the words were ſpoken of him as of a juſtice of peace, the action lies not.

ALL THE COURT were of opinion, that if it be not ſufficiently ſhewn he was a juſtice of peace at the time of ſpeaking the words, and ſo no ſcandal to him as juſtice of peace, the action lies not. But the whole Court conceived, although the firſt words, ſhewing he is a juſtice of peace by the king's commiſſion, &c. were void and apparently vicious (for it is impoſſible), and if he had reſted there, and there had been no other ſhewing of his authority, the action would not have lien; yet when he ſhews that he ſpake of him ſuch words, *adtunc* juſtice of the peace (which is at the time of the ſpeaking of the words), that ſufficeth; and what was alledged before is but ſurpluſage and vicious. And for the words they held, that they were ſcandalous (being ſpoken of a juſtice of peace). Whereupon it was adjudged for the plaintiff.

1. Roll. Ab. 48. Yelv. 145. Cro. Jac. 240. 1. Lev. 280. Cro. Eliz. 358. 4. Co. 16. 8. Mod. 270. Ld. Ray. 1369. Salk. 695. Stra. 420. 1153. Dougl. 667.

Sankill *againſt* Stocker.

CASE 21.

ACTION FOR WORDS. After verdict for the plaintiff, it was moved in arreſt of judgment, that here is a miſ-trial, not aided by any ſtatute; for upon the *venire facias* there were but twenty-three jurors returned, where there ought to have been twenty-four; and the trial was made by ten of the principal panel, and two of the *tales de circumſtantibus*.

A trial by a *tales*, where only 23 inſtead of 24 jurors are returned is erroneous, although 10 of the 12 who tried the cauſe were of the panel. Poſt. 278.

But JONES, WHITLOCK, and HYDE, *Chief Juſtice*, conceived, that, the trial being made, the non-returner of the twenty-fourth is but a miſ-return of the ſheriff, which is aided by the 18. *Eliz.* c. 14. And for this the caſe of *Tyrrill v. Gardiner* (*a*) was cited, where upon the *venire* twenty-three were returned, and the trial was by twelve of them, that was good, and aided by the ſtatute.

S. C. Jones, 245. 1 Roll. Ab. 80.

But againſt that it was urged by MAYNARD (and I MYSELF was of that opinion), that where the trial is by twelve of the principal,

(*a*) 5. Co. 37.

SANKILL *against* STOCKER.

it is good; but if there were not twelve of the principal ſworn, it ſhall not be good. And for this purpoſe was cited the caſe of *Calthorp v. News* (*a*), where in like manner a trial was by ten of the principal and two of the *tales*, and it was adjudged a miſ-triall. Whereupon it was adjourned.

A miſ-return to a *venire facias* is aided by the ſtatute of *jeofails*.

Dougl. 115. 1. Term Rep. 783.

But afterwards, upon conference with THE JUSTICES of both *Serjeants-Inns*, the greater part of them conceived, it was but a miſ-return, and aided by the 18. *Eliz.* c. 14. and 21. *Jac.* 1. c. 13. And although the trial was by two of the *tales*, it is not material to the parties, nor prejudicial to any of them, but only to the jurors, who loſe their iſſues; and it being but a miſ-return by the ſheriff, was aided by the ſtatutes. Whereupon it was adjudged for the plaintiff (*b*).

(*a*) Cro. Jac. 647. See 3. Geo. 2. c. 25. f. 8.

(*b*) *Sed quære*; for it is ſaid that on a writ of error the judgment was reverſed. 1. Roll. Abr. 800. pl. 8.

Michaelmas

Michaelmas Term,

7. Car. I. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.*
Sir George Croke, *Knt.*
} *Juſtices.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Memorandum.

CASE 1.

IN this vacation, *viz.* 25. *Auguſt*, 1631, SIR NICHOLAS HYDE, *Chief Juſtice* of the king's bench, being a grave, religious, diſcreet man, and of great learning and piety, died at his houſe in the county of *Southampton*; and SIR THOMAS RICHARDSON, *Chief Juſtice* of the common pleas, was made Chief Juſtice of the king's bench, and ſworn the 24th of *October*. He came to the ſaid bench attended with divers of the ſerjeants: and being in the court (after a ſpeech by the Lord Keeper, ſignifying the king's pleaſure, and his anſwering ſhortly thereto), he was ſworn, and his patent read, which was a writ under the great ſeal, directed to him by the name of "THOMAS RICHARDSON, *Chief Juſtice* of the common pleas," that the king had appointed him to be Chief Juſtice of the pleas before himſelf to be held; and commanded him to attend the ſaid office; which being read, he took his place in the court.

HYDE, C. J. dies, and is ſucceeded by RICHARDSON. Ante, 65. Poſt. 403. Jones, 247.

The ſame day SIR ROBERT HEATH was ſworn ſerjeant in chancery: and on the 25th of *October*, being *Tueſday*, came in his party-coloured robes to the common pleas and performed his ceremonies as ſerjeant; and the ſame day kept his feaſt at *Serjeants-Inn*, in *Chancery-lane*, and gave rings to every of the Judges, *quorum inſcriptio fuit*, "LEX REGIS, VIS LEGIS." And afterwards, upon the 27th of *October*, being *Thurſday*, he was ſworn Chief Juſtice of the common pleas.

Sir Robert Heath promoted.

The next day after WILLIAM NOY, one of the readers of *Lincoln's-Inn*, was made king's attorney general.

Noy made attorney general.

Smith *againſt* Norfolk.

CASE 2.

DEBT, as adminiſtratrix to *Smith* her huſband, for two-and-twenty pounds due upon a leaſe for years made by the inteſtate for *one quarter's* rent due in the life-time of the inteſtate, and *two quarters* rent after his death; the leaſe being made for one-and-twenty years by the inteſtate out of a leaſe for years whereof he was poſſeſſed, both of them having continuance for divers years yet to come. And the action was brought in the *detinet* only; and verdict for the plaintiff.

Debt by an adminiſtratrix againſt a leſſee for rent is well brought in the *detinet* only, though part of the demand accrued after the death of the inteſtate.

NOY and GERMYN moved in arreſt of judgment, that the declaration was not good, becauſe for the two laſt quarters of rent, due

F.N.B. 119. m. Savil, 130. Cro. Jac. 238. 546. 685. Reg. 139. b. 1. Lev. 250. Skin. 5. Cro. Eliz. 326. 712. Hob. 172. Carth. 49. 1. Sid. 343.

after

SMITH *againſt* NORFOLK.

after the death of the inteſtate, the action ought to have been in the *debet et detinet* (*a*). And for that they relied upon *Hargrave's Caſe* (*b*).

But JONES, WHITLOCK, and MYSELF held, that the action was well brought in the *detinet*, ſhe having the intereſt only as adminiſtratrix (*c*); and that *Hargrave's Caſe* reported is not law.—And JONES ſaid, he knew it to be reverſed in point of judgment for this cauſe.—Whereupon rule was given, that judgment ſhould be entered for the plaintiff, unleſs other cauſe was ſhewn, &c.

Cro. Jac. 546. Cro. Eliz. 712. 2. Mod. 185.

(*a*) *Vide* 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16. Ld. Raym. 1513.

(*b*) 5. Co. 31.

(*c*) Strange, 1271. 1. Wilſ. 171. Cowp. 570.

CASE 3.

Tavernor *againſt* Skingle.

A ſubmiſſion that if the arbitrators "*do not* "*agree*," they may chuſe an umpire, ſhall be *intended*, if they did not agree "*and make* "*an award*."

DEBT upon an obligation of one hundred pounds, conditioned to perform the award of *J. S.* and *J. D.* ſo as they made their award before the tenth of *October* following, under their hands and ſeals; and if they did not agree, then to ſtand to the umpirage of *J. N.* ſo as he made it in writing under his hand and ſeal before the twentieth of *October* following.

The defendant pleaded, that the ſaid *J. S.* and *J. D.* did not make any award before the tenth of *October*, nor *J. N.* the umpire before the twentieth of *October*, &c.

2. Roll. Ab. 148. 1. Sid. 151. Salk. 659. 2. Term Rep. 643. 3. Term Rep. 592. Kyd on Awards, 84.

The plaintiff replies, True it is that *J. S.* and *J. D.* did not agree, nor make any arbitrament before the tenth of *October*; but that *J. N.* the umpire did make an award before the twentieth of *October* under his hand and ſeal, and ſhews it; wherefore *inter alia* the defendant was to pay to the plaintiff thirty pounds upon ſuch a day, at the houſe of *William Sutton*, in *Chelmsford*, being the ſign of *the Cock*; and for the non-payment of the ſaid thirty pounds alledgeth the breach.

The defendant thereupon demurs.

WRIGHT, *for the defendant*, moved, that this ſubmiſſion is void and uncertain; for it is, "if they do not agree," and it doth not appear to what they ſhould agree; and an uncertain ſubmiſſion is void.

Sed non allocatur: for the words, "if they do not agree," have the intendment, if they do not agree and make their arbitrament under their hands and ſeals before ſuch a day; for otherwiſe it is *quaſi* no agreement within that condition.

An award appointing one of the parties to pay money *at* or *in* the houſe of a ſtranger, is good. Poſt. 433. Moor, 3. 2d. Co. 131. 1. Roll. Ab. 247. Plowd. 71. 3. Lev. 153. 1. Roll. Rep. 6. Jones, 431. 2. Mod. 9. 1. Salk. 74.

WRIGHT then moved, that this arbitrament by the umpire was void; for he appoints money to be paid at the houſe of a ſtranger, wherein by intendment the defendant hath no intereſt, nor can compel him that is owner of the houſe to ſuffer money to be paid there: and an arbitrament ought not to appoint a thing to be done to a ſtranger, or by a ſtranger, over whom the defendant hath not power, nor in a ſtranger's houſe; by which act the defendant might be a treſpaſſer. 5. *Ca.* 77. 22. *Hen.* 6. *pl.* 46.

But ALL THE COURT agreed, that the arbitrament was good; for the appointment of the payment of the money at a ſtranger's houſe (eſpecially being by intendment a common inn) cannot be unreaſonable, or ſhall make an unlawful act; but by intendment the plaintiff will procure ſuch kindneſs that the money may be paid

1. Com. Dig. 384. Kyd on Awards, 126.

there;

there; and if the ſtranger ſhall deny the payment to be there, it peradventure may be a good excuſe for the defendant: but the arbitrament by itſelf, *primâ facie*, is good enough. Whereupon it was adjudged for the plaintiff.

TAYLER *againſt* SKINGLE.

Beamond *againſt* Long.

CASE 45

Ante, fol. 208.

THIS Caſe was now moved and argued by MAYNARD, *for the defendant*, and by ROLLE, *for the plaintiff*. And for the plaintiff he firſt argued, that although the huſband ſhall not have a debt due to the wife after her death without recovery, yet if they bring debt and recover, and after the wife die, the huſband ſhall have that debt, *quia tranſit in rem judicatam*: and although the huſband here ſhould have execution in the right of his wife as adminiſtratrix, he could not have it to his own uſe, but to ſatisfy the debts of the inteſtate; and when they are ſatisfied, he is chargeable over in accompt to the next adminiſtrator, or peradventure ſhall be chargeable for that debt as an executor *de ſon tort demeſne*; and they having been at the charge to recover that debt, and coſts and damages awarded to them, it is no reaſon the huſband ſhould loſe them. And he cited one *Preſt's Caſe* in the common pleas, where an adminiſtrator, *durante minore ætate*, recovered in debt, that the executor at his full age might have execution of that debt.

If a feme executrix to *A.* marry, and then huſband and wife bring debt on an obligation againſt *B.* in right of the wife as executrix, and have judgment to recover debt, damages and coſts, and the wife dies before execution, the huſband cannot have a *ſcire facias* on the judgment; for although he was privy thereto, yet he is not entitled to the thing recovered. Ante, 167. 208. Poſt. 451. 464. S.C. Jones, 248. S. C. 1. Roll. 889. Godb. 604. 1. Roll. 921. Cro. Jac. 4. Hob. 250. 1. Sid. 337. Cro. Eliz. 844. 3. Mod. 188. Salk. 116. Skin. 682. 1. Com. Dig. 251. 2. Bac. Ab. 385. Dougl. 637.

But ALL THE COURT, HYDE, *Chief Juſtice*, being dead, and none in his place, conceived, that this *ſcire facias* lies not; for the firſt action was brought by the huſband and wife *adminiſtratrix*, which is in *another's right*; and the recovery being thereupon, is in right of the inteſtate: and the wife being dead, the huſband cannot claim that debt; for he not being adminiſtrator hath not any intereſt therein; for the adminiſtratrix being dead, the ſuit is merely determined, and cannot be revived by any but by him who comes in in that right, and ſo doth not the huſband: and it differs not from THE YEAR-BOOK (*a*), where an executor recovers debt and dies inteſtate, the adminiſtrator cannot have a *ſcire facias*, becauſe he is not privy to that judgment, and he claims not *paramount* the judgment; and they doubted of *Preſt's Caſe*. But it is clear, if adminiſtration be committed becauſe no will is extant, and the adminiſtrator recover in debt, and after the will is proved wherein there is an executor, ſuch an executor ſhall never have a *ſcire facias* upon that judgment. And although it was objected that the judgment is for coſts and damages, which belong to the huſband, although the ſaid debt did not belong to him, and therefore the *ſcire facias* ſhould be maintained for the damages; yet THE COURT held, that the *ſcire facias* to have execution of the judgment for the debt, and alſo for the damages, is not maintainable: and, Whether he might maintain a *ſcire facias* for the damages and coſts? they would not deliver any opinion. Yet it appears 19. *Edw.* 4. *pl.* . if one recover, in a real action, land, and damages, and die before execution, the heir ſhall have a *ſcire facias* to have execution for the land, and the executor for the damages. But for the principal caſe they all held, that the *ſcire facias* lies not as it is brought; and gave

(*a*) 28. Hen. 8. pl. 9. cited in Brudnel's Caſe, 5. Co. 9. b.

judgment

BRAMOND *againſt* LONG.

judgment for the defendant.—This caſe being moved at the table at *Serjeants-Inn* to the Chief Baron and other barons, and to HARVEY, *Juſtice*, they all agreed in the ſame opinion (*a*). *Vide poſtea*, 464.

(*a*) See 17. Car. 2. c. 8. by which an *faciat*; and 29. Car. 2. c. 3. that the huſ- adminiſtrator *de bonis non* may ſue *ſcire* band ſhall have adminiſtration.

CASE 5.

Reynell *againſt* Champernoon.

The owner of a ſeveral fiſhery may *detain* nets or other engines *damage feſant*; but if he *cut* or deſtroy them, treſpaſs will lie.

3. Burr. 1770.
2. Wilſ. 313.
5. Com. Dig. 360.
2. Eſpin. Dig. 106.
Dougl. 56.

TRESPASS, for taking and cutting of his nets and oars. The defendant juſtifies, For that he was ſeiſed in fee of a ſeveral piſcary, and that the plaintiff, with divers others, endeavoured with their oars to row upon his water, and with the nets to catch his fiſh; and for the ſafeguard of his fiſhing he took and cut the nets and oars, &c. Whereupon the plaintiff demurs.

It was moved by BULSTRODE WHITLOCK, that this plea is not good, for he cannot by ſuch colour cut the nets and oars.

ALL THE COURT was of this opinion, for the reaſon *ſupra*; but he might have taken the nets and oars, and detained them as *damage feſant*, to ſtop their further fiſhing. Whereupon it was adjudged for the plaintiff.

CASE 6.

Tyler *againſt* Wall.

In treſpaſs, juſtification by a warrant need not anſwer or traverſe *the day laid*, if it aver it to be the *ſame treſpaſs*; but a confeſſion and avoidance of the plea, by alledging a *ſubſequent* treſpaſs, is a departure from the declaration.

Poſt. 246. 334. 514. 573.
Bro. Treſ. 219.
2. Saund. 295.
2. Sid. 294.
1. Buſſt. 138.
2. Freem. 246.
Lutw. 452. 1457.
2. Jones, 146.
5. Lev. 277.
Raym. 86.
5. Com. Dig. 86 99.
3. Bac. Ab. 519.
Bull. N. P. 17.
1. Term Rep. 479.
H. Bl. Rep. C. B. 555.

TRESPASS of aſſault, battery, and impriſonment, *ultimo die Octobris, ſexto Caroli*, at *Withering*, and carrying him to *Tiverton*, and detaining him in priſon for two days. The defendant juſtifies, Becauſe, 13. *Auguſt*, 6. *Car.* 1. a writ of *ſupplicavit de bono geſtu* iſſued out of chancery, and by a warrant from the ſheriff to the defendant, being his bailiff, he arreſted the plaintiff the twenty-firſt of *September*, and detained him two days, and carried him to *Tiverton*, and delivered him to the ſheriff; which is the ſame arreſt, detention, and impriſonment, &c. The plaintiff replies, and confeſſeth the writ, warranty, and arreſt, the twenty-firſt of *September*, and impriſonment for two years, as the defendant hath alledged; but ſhews, that he afterward found ſureties before the ſheriff according to the writ, and was diſcharged; and that the defendant "*poſtea*, "VIDELICET, *prædicto primo Octobris, ſexto Caroli*," aſſaulted and impriſoned him, *de ſon tort demeſne. Et hoc, &c.* And upon this the defendant demurs,

HUTCHINS, *for the plaintiff*, now moved, that the plea in bar was not good, becauſe he doth not anſwer the time in the declaration, "VIDELICET, *ultimo Octobris*," neither by anſwer nor by traverſe.

But GRIMSTON, *for the defendant*, argued, that the juſtification being of an act in the ſame county, and juſtifying all the time in the declaration, although it doth not agree with it in the day, but concludes *quæ eſt eadem tranſgreſſio, &c.* is good enough, the day not being material.

And ALL THE COURT were of the ſame opinion; and alſo conceived, that the replication was not good, varying from the day in his declaration, and is a departure therefrom.

Hughs,

Hughs, Adminiſtrator of J. D. *againſt* Harrys.

CASE 7.

ACCOMPT againſt the defendant; for that he occupied, as guardian of *J. D.* for nine years, ſuch lands which were granted to *W. D.* father of *J. D.* and his heirs, by copy of court-roll, *tenendum ſecundum conſuetudinem manerii* of *O.* who entered and died ſeiſed thereof, which deſcended to the ſaid *J. D.* and the defendant received the profits as guardian; and afterwards *J. D.* died, and the plaintiff, as adminiſtrator to him, brings the action.

An eſtate granted by *copy*, &c. omitting the words *ad voluntatem domini*, ſhall be intended a cuſtomary freehold: ACCOUNT lies againſt a ſtranger as guardian, who enters and receives the profits.

The defendant pleads, that he did not receive the profits as guardian; and iſſue being joined thereupon, it was found for the plaintiff.

And now GRIMSTON moved in arreſt of judgment,

FIRST, That the declaration is not good, becauſe he doth not recite the ſtatute of *Marlbridge*, according to the uſual courſe in ſuch declarations.—*Sed non allocatur*: for being a general law, it needs not to be recited: alſo that ſtatute doth not give the action, but is only in affirmance of the common law; as *Co. Lit.* 89. a. is.

It is not neceſſary to recite the *ſtat. of Marlb.* in the declaration. Poſt. 246. 514. 2. Inſt. 404. F. N. B. 117. 1. Roll. Ab. 119. 562. 2. Roll. Ab. 127. Reg. 36. Co. Lit. 172. a. 58. 9. Rep. 76. Co. Copyh. ſ. 32. 2. Vent. 143. 90. 8. Com.

SECONDLY, It doth not appear that they were freehold lands, but may be copyhold; then againſt ſuch a perſon which occupies a copyhold ACCOMPT lies not.—*Sed non allocatur*: for although it be mentioned that the land is granted by copy, it is not ſaid, *tenendum ad voluntatem domini*; ſo it may be well intended a freehold. And in *Wales* there are many freeholds granted *by copy* and *by virge*.

For the plea, which was, that he did not receive as guardian, it being found againſt him, he ſhall be intended lawful guardian. —Whereupon it was adjudged for the plaintiff.

Carth. 432. 2. Wilſ. 115. Ld. Raym. 1225. 2. Bl. Com. 149. 1. Com. Dig. 86. Dig. 530. 2. Hawk. P. C. 349.

Anonymous.

CASE 8.

ACTION for theſe words of an attorney: "Thou art a knave, "and ſtirreſt up ſuits betwixt parties; and ſtirredſt up a ſuit "betwixt ſuch parties to their undoing; and it is great pity ſuch "perſons ſhould go unhanged."—ADJUDGED for the plaintiff, that the action lies.

Words actionable. Poſt. 516.

Hollingſhead's Caſe.

CASE 9.

HOLLINGSHEAD prayed a *prohibition* to ſtay a ſuit in the ſpiritual court for defamation, for ſpeaking theſe words: "Thou "art a bawd, and I will prove thee a bawd."—And becauſe theſe are words properly determinable in the ſpiritual court, and for which no action lies at the common law, a prohibition was denied: but for ſaying, "Thou keepeſt an houſe of bawdry," this being matter determinable at the common law by indictment, ſuit ſhall not be in the ſpiritual court. *Vide* 27. *Hen.* 8. and 4. *Co.* 20. a.

It is not actionable to call a woman a *bawd*; but it is cognizable in the ſpiritual court. 8. C. poſt. 261. Poſt. 285. 329. 393. Jones, 246. 11. Mod. 1136.

2. Roll. Ab. 296. 1. Freem. 300. 3. Lev. 18. Salk. 692. 696.

CASE 10.

Sanders *againſt* Corniſh.

Trinity Term, 5. Car. 1. Roll 840.

An executory deviſe of a term of years upon contingencies ſo remote as to create a poſſible perpetuity is void.

1. Roll. Ab. 611, 612. Jones, 15, 16. 8. Co. 95. a. Cro. Jac. 198. 461. 3. Cha. Caſ. 36. Salk. 225. 229. 12. Mod. 287. 1. Vern. 164. Forres, 232. Dyer, 74. 35S. 1. Sid. 451. Skin. 341. Stra. 133. 1. Black. Rep. 189. 1. Brown's C. C. 170. 187. 2. Brown's C. C. 33. See Mr. C-x's edit. Peere Will. 3. vol. 261. and the caſes there cited; and 2. Bl. Com. 174. 3. Burr. 1634. 2. Com. Dig. 369. 2. Bac. Ab 78. Cowp. 309. Dougl. 487. 506. 2. Term Rep. 209. 3. Term Rep. 143. H. Bl. Rep. 30.

TRESPASS for breaking his cloſe at *Weſtbrook*. Upon not guilty pleaded, a ſpecial verdict was found, that

Simon Sanders was poſſeſſed of a leaſe for one hundred and three-ſcore years of the land in queſtion; and by his will in writing, reciting that he had ſuch a leaſe, deviſeth, that his brother *Chriſtopher Sanders* ſhould have the uſe and occupation thereof, and ſhould take the profits of it during his life; and after his death, the uſe and occupation ſhould remain to the wife of *Chriſtopher* during her widowhood; and after her widowhood, the uſe, occupation, and profits of the premiſes to be and remain to the eldeſt ſon of the ſaid *Chriſtopher*, which he ſhall happen to have, during *his* life; and after, ſuch ſon dying without heir male, to any other ſon which the ſaid *Chriſtopher* ſhall happen to have, one after another, in form aforeſaid. "And if the ſaid *Chriſtopher* happen to die without heir "male of his body, and for that I have a purpoſe to have the ſame "leaſe kept in my name, my will and meaning is, That the uſe and "profits and occupation ſhall remain and be to *Simon Sanders*, &c. "in the ſame manner as before," &c.; and ſo to divers others in the ſame words; and makes the ſaid *Chriſtopher* and *Simon Sanders* his executors, and dies poſſeſſed: and that the ſaid executors proved the will, and aſſented to the ſaid legacy; that *Chriſtopher* entered, and died without iſſue, and made the ſaid *Simon* his executor; *which Simon* entered, and had iſſue *John*, and the plaintiff his eldeſt ſon, and after made *John* his ſon executor, and died; and *John* proved the will and entered, and made the defendant his executor, and died; and that the plaintiff entered, and the defendant ouſted him: and if, &c.

The queſtion was, Whether this deviſe of a term in this manner be good to go in remainder; and if ſuch remainders, the one after the other, and limitation of the deviſe of a leaſe, may be good?

And ALL THE COURT inclined in opinion, that the deviſe of a term in this manner to make a perpetuity, cannot be good; for to limit a poſſibility after a poſſibility, and to limit the remainder of a term after a dying without iſſue, ſtands not with law. But THE COURT would adviſe.

CASE 11.

Jenkins *againſt* Young.

Eaſter Term, 6. Car. 1. Roll 53.

Lands given to a huſband and wife, *habendum* to the uſe of them and the heirs of their two bodies, creates an eſtate tail.—*Vide* S. C. 24. Meredith v. Jones, Co. Lit. 271. b. third diviſion of note (1), and the caſe of Denn v. Gillot, 2. Term Rep. 431.

ERROR of a judgment in the county of *Flints*. The error was aſſigned in the matter in law. The caſe, being adjudged upon a ſpecial verdict in an ejectment, was, That 33. *Eliz.* one *Meredith* gave that land to *Edward Randall* and his wife, HABENDUM to the ſaid huſband and wife, to the uſe of them and the heirs *of* their two bodies; and for default of ſuch iſſue, to the uſe of *Edward Morgan* and his heirs.

The queſtion was, Whether the huſband and wife have an eſtate tail, or but for their lives? And it was there adjudged for the then plaintiff, that it was an eſtate tail.

LITTLETON

LITTLETON now argued, that it was error; for he alledged, that the eſtate, out of which the uſe ſhould riſe, was but for their *lives*; and the uſe cannot make the eſtate larger than the limitations: as 3. *Eliz. Dyer*, 186. where land was given to two for their lives, to the uſe of another for his life, if the leſſees die, the uſe to him to whom it is limited is determined.

JENKINS *againſt* YOUNG.

Cro. Jac. 401. Gilb. Rep. 17. Bac. Uſes, ed. 1785, p. 63. Com. 313. Skin. 209. 3. Com. Dig. 333. 5. Com. Dig. 625. 7. Bac. Ab. 262. Cowp. 416.

But JONES, WHITLOCK, and MYSELF, upon the firſt motion, conceived, that there is difference where *an eſtate* is limited to one, and *the uſe* to a ſtranger, there the uſe ſhall not be more than the eſtate out of which it is derived; but not when the limitation is to two, *habendum* to them, to the uſe of the heirs of their bodies, this is no limitation of the uſe, nor is the uſe to be executed by the ſtatute; but it is a limitation of the eſtate to them and the heirs of their bodies, and they are in by courſe of common law: and ſo it ſhall be taken as a limitation to them and the heirs of their bodies, remainder to the other and the heirs of the other, that the deed may be conſtrued according to the intent of him that made it.—And JONES ſaid, that he had known this to be ſo adjudged in *Wales* before this time.—Whereupon THE COURT would further adviſe. *Et adjournatur.*

The King *againſt* Maynard.

CASE 12.

INFORMATION for engroſſing one hundred buſhels of ſalt to ſell again, contrary to the form of the ſtatute of 5. *Edw.* 6. c. 14. (*a*). Upon the declaration it was demurred.

Salt is a victual within the ſtatutes againſt engroſſing; but not apples, cherries, plums, or other fruits; nor hops, malt, or any other articles uſed more for pleaſure than neceſſity.

NOY and MASON argued, that this information is not maintainable:—FIRST, Becauſe engroſſing is no offence in itſelf, nor *foreſtalling* and *regrating* were not in themſelves offences puniſhable before the ſtatute; nor is *engroſſing* in itſelf unlawful, but by conſequence, or by reaſon of the things bought and made dearer, which ought to be ſhewn in the indictment or information.

SECONDLY, Becauſe it is not any victual within the words or intent of the ſtatute; for it is not victual, but only *condimentum*, and for preſervation of victual: and he cited a record in *Eaſter Term*, 18. *Eliz.* adjudged, that buying of barley and converting it into malt, and ſelling it, was no offence puniſhable in a mayor, who ſold it; nor made him to be a victualler (the mayor being prohibited to ſell victuals). And 20. *Jac.* 1. adjudged likewiſe, that hops were not victuals within the ſtatute. And *Paſ.* 15. *Jac.* 1. *Rot.* 36. adjudged, that buying of apples to ſell again was not within the ſtatute. And where it is mentioned 13. *Eliz.* c. 25. (*a*), that the 5. *Edw.* 6. c. 14. doth not extend to buying of oils, wine, and other merchandize, except fiſh and ſalt, it is to be intended that was not in the point of engroſſing, but for foreſtalling and regrating, which is prohibited: and it would be a great inconvenience if ſalt ſhould be within the law to be victuals, to be prohibited to be engroſſed; for then it ſhould extend to thoſe that carry ſalt in wains to be ſold, and would enforce every one to buy ſalt by the

3. Inſt. 195. Sum. 152. Owen, 135. 1. Roll. 12. Bridg. 5, 6. Moor, 595. Cro. Jac. 214. 4. Com. Dig. 98. 1. Hawk. P. C. 479.

(*a*) Repealed by 12. Geo. 3. c. 71.—See Hawk. P. C. 6. edit. 8vo. p. 482.

THE KING *against* MAYNARD.

buſhel or peck at ſhips or ſalt-pits, which the law never intended; but the law intends thoſe things which are ſold in great quantity, uſually at every market in every county, as corn, cattle, butter, cheeſe, &c.: but if any engroſs all the ſalt with an intent to ſell it at his own price, and at unreaſonable prices, he may be thereof indicted as for an offence at the common law; and if it be found, he is finable, as appears by a record in *Eaſter Term* the 43. *Edw.* 3. *Roll* 19. ſhewn in Court.—Whereupon it was adjourned.

CASE 13.

Anonymous.

If a *feme ſole* plaintiff, after verdict and before the day in bank, take huſband, the defendant cannot plead the coverture in abatement. Poſt. 236. Cro. Eliz. 202. Cro. Jac. 323. 646. 4. Leon. 15. 1. Bulſt. 5. Jones, 367. 411. 1. Com. Dig. 76.

TRESPASS by a plaintiff, being a *feme ſole*. The parties being at iſſue, and tried by *niſi prius*; and verdict for the plaintiff, and damages and coſts; the defendant *al jour in banco* pleads, that after the verdict, and before the day, the plaintiff took to huſband one *J. S.* and ſhe being married, demanded judgment, &c.

And thereupon it was moved by ROLLES, that this being a plea ariſing after the verdict, and before the day *in banco*, cannot be pleaded; but prayed to have it diſallowed, and that ſhe ſhould have judgment, for the defendant hath no day to plead it.

THE CHIEF JUSTICE and MYSELF were of this opinion, *cæteris abſentibus*.—Whereupon rule was given, that this plea ſhould be ouſted, and the plaintiff ſhould have judgment, unleſs other matter ſhould be ſhewn, &c. *Vide* 4. *Hen.* 4. *pl.* 3. 21. *Hen.* 6. *pl.* 10. 21. *Hen.* 7. *pl.* 33. 5. *Hen.* 7. *pl.* 40.

CASE 14.

The King and Barnes *againſt* Hill and Windſor.

The 32. *Hen.* 8. c. 9. againſt buying titles is a public act; but if an informer recite it, and miſtake the commencement or concluſion of the parliament, it is a fatal error. Ante, 135, 136. Poſt. 522. Cro. Jac. 111. 133. Godb. 456. Plowd. 38 a. 2. Lev. 296. Lut. 140. 1409. Dyer, 95. 203. Fort 372. Raym. 191. Strange, 212. 1. Com. Dig. 231. 2. Hale, 173. 1. Hawk. P. C. 555. 2. Hawk. P. C. 350. Ld. Raym. 382.

INFORMATION, upon the ſtatute of 32. *Hen.* 8. c. 9. for buying of titles of one who had not been in poſſeſſion for one year, nor had any reverſion or remainder.

After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment,

FIRST, Becauſe he miſ-recites the ſtatute in the date and in the continuance; for he recites it to be at a parliament *inchoat. duodecimo Aprilis*, and continued *uſque viceſimo quinto Martii* following, which is a miſpriſion in both: for although the ſecond ſeſſions of the ſaid parliament began the twelfth of *April*, yet the parliament began the twenty-eighth of *April* 30 *Hen.* 8. and the ſecond ſeſſion began the twelfth of *April* 31. *Hen.* 8.; and the continuance by prorogation was not until the 25th of *March*, but until the twenty-fifth of *May*, *et ab inde uſque Julii*, and then diſſolved. Wherefore for this miſpriſion, although it be a general act, and recited where it needs not to be recited, yet that miſ-recital makes it ill. *Vide Plow.* 78.

But ROLLES, *for the plaintiff*, ſaid, that although the ſtatute is miſ-recited, yet it is not material; for he doth not alledge, that it is an offence againſt the ſtatute *aforeſaid*, for then he had tied it to

the

the ſtatute recited: but it is alledged, that he bought pretended rights, *contra formam ſtatuti in hujuſmodi caſu editi prout.* But the record being viewed, it was, that the defendant *ſtatutum prædictum minime curans*, and relied upon the ſtatute recited; and there is no ſuch ſtatute, &c.

THE KING and BARNES *againſt* HILL and WINDSOR.

THE SECOND EXCEPTION was, Becauſe it is alledged, that the defendant *Hill* not being ſeiſed of ſuch tenements, nor having a remainder or reverſion therein, conveyed and granted *tricesimo primo Octobris, quarto Caroli*, thoſe tenements by way of maintenance and champerty to the ſaid *Windſor*; and for confirmation of the ſaid conveyance, the ſaid *Hill* and *Suſan* his wife, by fine, in *Hilary Term*, 4. *Car.* 1. granted the ſaid tenements to *Windſor*, and doth not aver in fact, that it is a pretended right, &c. as he ought to do; for that is the point of the action.

An information on 30. *Hen.* 8. c. 9. againſt buying pretended titles, muſt aver that the ſeller had *a pretended right.* Plowd. 87. b. Lit. Rep. 369. Dyer, 74. 1. Hawk. P. C. 555. 3. Bac. Ab. 526.

THE THIRD EXCEPTION, Becauſe the value of the land at the time of the fine was 800l.; and he doth not ſhew what was the value of the land at the time of the bargain of thoſe tenements; and it may be they were of better value at the time of the fine than at the time of the grant; and the grant of them is the offence.

An information for buying a pretended title muſt ſtate the value of the land at the time of the bargain. 1. Hawk. P. C. 555.

THE FOURTH EXCEPTION, Becauſe the verdict finds *Hill* and his wife guilty, and the wife was not party to the ſuit.

A verdict variant from the record is erroneous. 2. Hawk. P. C. 351.

And THE WHOLE COURT conceived, that theſe defaults in the information made it ill, and that the verdict was ill. But they would adviſe thereupon.

Cowp. 178. 766.

Mathews *againſt* Whetton.

CASE 15.

Hilary Term, 4. *Car.* 1. *Roll* 496.

TRESPASS. Upon a ſpecial verdict the caſe was, A *feme* copyholder for life takes *baron*. The huſband makes a leaſe to one, 25. *March*, 3. *Car.* 1. by indenture for a year; by another indenture, dated the ſame day and year, makes a ſecond leaſe to the ſame party for a year, to commence 27th *March*, after the end of the ſaid firſt leaſe; and by a third indenture, bearing date the ſame day and year, makes a leaſe to him for a year, to begin the 29th of *March* next enſuing the end of the ſecond leaſe; and ſo betwixt each leaſe two days, betwixt the beginning of the new leaſe and the end of the former. The huſband afterwards ſurrenders his copyhold to the lord, who enters, and lets to another for forty years; and afterwards, during the ſecond leaſe, the firſt leſſee enters, and the lord's leſſee ouſts him: and if the entry of the lord's leſſee be lawful, they pray the diſcretion of the Court, &c.

A copyholder, by ſpecial cuſtom, may make a leaſe for a year; but if he make three leaſes together, each to commence within two days after the expiration of the other, it is an evaſion of the cuſtom and forfeiture of the eſtate; and the lord's acceptance of the ſurrender, not knowing of the forfeiture, will not avoid it. S. C. Jones, 249. 1. Roll. Abr. 508. 510. 133. Co. Lit. 3. Co. 51. 9. Co. 75. Cro. Jac. 301. 308. 403. Mo. 2. 539. 569. 1. Brownl. 59. a. note (4). 2. Com. Dig. 510. 526, 527. 3. Bac. Abr. 404. 1. Term Rep. 474.

ROLLES now argued *for the plaintiff*. The firſt queſtion he made was, Whether the firſt leaſe be a forfeiture? And he argued, that it ſhould not be a forfeiture; for by the law of the land every copyholder may make a leaſe for a year without forfeiture; and here is but a leaſe for one year: and although it may be objected, it is a

MATHEWS *againſt* WHETTON.

deviſe to avoid a forfeiture, and ſo covinous and fraudulent, which the law will not favour; yet, he ſaid, fraud and practice ſhall not be intended, unleſs it be found.

2. Vent. 39. Cro. Jac. 301. 3. Bulſt. 190.

The SECOND QUESTION, Admitting it to be a forfeiture, yet the lord taking a ſurrender and not entering for the forfeiture, but making a leaſe for years, his leſſee ſhall not enter for the forfeiture; for the leſſee cannot, when the lord allows thereof.

GRIMSTON, *for the defendant*, argued, that it is a forfeiture; for the three leaſes being all made at one time, ſhall be intended one entire contract, and not warranted by the cuſtom; but it is fraud and practice apparent to deprive the lord of his forfeiture: and this covin needs not to be found, as a leaſe for three hundred years is *mortmain*; and if a jointreſs within the ſtatute of 11. *Hen.* 7. c. 20. make a leaſe by fine for five hundred years, this is a forfeiture as well as an alienation of the freehold of the land, for it is an equal miſchief. And he denied, that a copyholder may make a leaſe for a year by the law of the land and the general cuſtom of the realm; for he ought to have a ſpecial cuſtom, otherwiſe it is not good, unleſs it be for the trial of a title, which hath been allowed, becauſe it is for reducing a right, and for the lord's benefit.

SECONDLY, He ſaid, Admitting it is a forfeiture, yet the lord's acceptance of the ſurrender, not knowing of the forfeiture, is no diſpenſation therewith, and conſequently that the lord's leſſee hath a good eſtate and right in him, for which his entry is lawful.

And JONES, WHITLOCK, and MYSELF, were of that opinion. Whereupon a rule was given upon the firſt argument, that judgment ſhould be entered for the defendant, unleſs other cauſe was ſhewn.—And another day being moved again, RICHARDSON, *Chief Juſtice*, being then preſent, although he at the firſt doubted on the ſecond point, yet it was adjudged by his conſent for the defendant.

CASE 16.

Holyday *againſt* Oxenbridge.

A private perſon may juſtify arreſting a common gambler, whom he detects cheating with falſe dice.

2. Jones, 249. 2. Roll. 546. 2. Hawk. ch. 12. ſ. 2. Dougl. 359. Calliecott's Caſes, 291.

TRESPASS of aſſault, battery, wounding, and evil-intreating, at *London*, *&c.* The defendant pleads as to the wounding not guilty. As to the reſidue of the treſpaſs he pleaded, that *diu ante tempus quo*, *&c.* the plaintiff, at *Bedington*, in the county of *Surry*, *communiter uſus fuit* an ill trade called "cheating at play" of divers the king's ſubjects with falſe dice, and defrauding them of their money; and for the uſing of his ſaid ill trade, wandering up and down the country to find out perſons inexpert at playing at ſuch games, to deceive them of their money; and in his ſuch wandering the country, to ſuch intents, *tempore quo*, *&c.* came to the houſe of *Sir Nicholas Carew*, at *Bedington* aforeſaid, to find any whom he might, by playing with falſe dice, deſpoil of his money; where finding the defendant and one *William Arnold* in ſuch play unexpert, deſired them to play with him in the ſaid houſe; whereupon the defendant and the ſaid *William Arnold*, not ſuſpecting any hurt or deceit,

HOLYDAY *against* OXENBRIDGE.

deceit, *prædicto tempore quo, &c.* played with the plaintiff in the said house of *Sir Nicholas Carew* at dice for money (the said *Sir Nicholas* being in the house, and a justice of peace of the said county); and the said plaintiff playing with the defendant and the said *William Arnold* with false dice, subtilly conveyed by the plaintiff (divers sums of the defendant's money, *falso et fraudulenter depredatis*), would presently have departed from the house, and sought to escape; but the defendant knowing certainly that he was deceived by the said false art of cheating with false dice, *prædicto tempore quo, &c. molliter manus imposuit* upon the plaintiff to bring him before the said *Sir Nicholas* to be examined concerning the said offence: and he examining and finding him upon his examination various and uncertain in his answer, bound him by recognizance to appear at the next sessions for the peace of the county of *Surry*; at which sessions he appearing, was indicted and convicted of the said offence; which said imposing of his hands and bringing him before *Sir Nicholas Carew*, for the causes aforesaid, *fuit residuum transgressionis prædictæ*; and traverses the trespass in *London* or elsewhere, except at the said house of *Sir Nicholas Carew*. Upon this plea the plaintiff demurred.

GERMYN, *for the plaintiff*, now moved, that the plea was not good; for one cannot without an officer, for any cause, and that upon his own suspicion only, arrest or stay any person unless in felony, especially in his own case.

But ALL THE COURT (the Chief Justice being absent) held the plea to be good; for it is shewn, that he was a common cheater, and that he cozened with false dice, and therefore the defendant led him to a justice of peace, being in the same house: and it appears by the plea, that there was good cause of staying him, for he is afterward indicted and convicted of that offence; and it is *pro bono publico* to stay such offenders. And the cause of the said arresting, staying, and bringing him before a justice of peace, being by demurrer confessed to be true, they held it to be a good plea, and that the plaintiff had no cause of demurrer. Whereupon rule was given to have judgment entered for the defendant, &c.

Cro. Jac. 498.

Lakins *against* Sir John Lamb and Holt.

CASE 13.

QUARE IMPEDIT of the church of *Segrave*, in the county of *Northampton*. The plaintiff entitles himself by grant of the next avoidance. *Sir John Lamb* pleads to the issue "*non concessit*," as the plaintiff counts; and issue being joined, it was tried by *nisi prius*. *Holt*, the other defendant, pleads a plea; whereupon it was demurred. The verdict being found for the plaintiff at the summer assise, and the *postea* being returned at *octabis Michaelis*, the entry was, "*Curia advisare vult*" of the judgment upon the verdict and demurrer: and day was given to *the plaintiff* and *Holt usque octabis Hilarii*; and then judgment was given for the plaintiff, as well upon the verdict as upon the demurrer.

If issue be joined by one defendant, and verdict thereon, and a demurrer by the other defendant, and several continuances entered to the demurrer, a judgment on both is good, although no continuance is entered after the verdict. Ante, 232. Post. 380.—Cro. Jac. 528. Cro. Eliz. 489. 1. Bac. Ab. 93. 5. Com. Dig. 177.

Larive *against* Sir John Lamb and Holt.

And becauſe no day was given to *Sir John Lamb*, againſt whom the verdict is found, it was by Mr. Grimston aſſigned for error; for that the judgment not being given the ſame Term in which the *poſtea* was returned, but at another Term, day ought to have been given to all the parties, and therefore it is *a diſcontinuance*; and diſcontinuances after verdicts are not aided.

But all the Court held, it was not any *diſcontinuance*; for the verdict being found againſt *Sir John Lamb*, he is out of the court, and no day ſhall be given to a defendant againſt whom a verdict was found; for he hath no day in court to plead any thing: but in this caſe day is only to be given to the party who is to plead to the demurrer. And divers precedents were ſhewn here in the Old and New Book of Entries, where the entry is only in ſuch manner; wherefore it was held no error.—Afterwards judgment was affirmed.

Case 18.

Mot and Alice his Wife *againſt* Butler.

Trinity Term, 7. Car. 1. Roll 5.

A declaration in ſlander ſtating a *colloquium* of *A.* and *B.* and that the defendant ſaid, "*A.* hath "ſtolen my "goods, and "*ſhe* (*innuendo* "the plaintiff) "was privy "thereto," is ſufficiently certain.

Comp. 276.

ACTION FOR WORDS. Whereas there was communication betwixt the defendant and *J. S.* of one *Sibill Goodwin* and of *Alice* the plaintiff; that the defendant ſpake theſe words of the ſaid *Sibill* and the ſaid *Alice*: "Sibill Goodwin" (*innuendo* the ſaid *Sibill Goodwin*) "hath ſtolen away ſuch goods," mentioning what they were; "and ſhe" (*innuendo* the plaintiff) "was privy and conſenting "thereunto."

After verdict, upon not guilty, and found for the plaintiff, it was moved in arreſt of judgment, that the communication being of two, and not ſpecially of *Alice*, but "she," *innuendo* the plaintiff, there cannot be any reference to the plaintiff: ſo the words do not appear to be ſpoken of her; and the *innuendo* will not help: and cited for that 4. *Co.* 17. b. *Roberts' Caſe.*

But the Court held, it was certainly and ſufficiently alledged; for the words are to be referred *ſingula ſingulis*: and when it is ſaid, "*Sibill Goodwin* ſtole ſuch goods, and she (*innuendo* the plaintiff) "was privy and conſenting, &c." this word "she" cannot be referred to *Sibill*, but to the plaintiff: and for the words, that "ſhe was "privy and conſenting to the ſtealing of the goods," there is good cauſe of action; for ſhe accuſeth her to be acceſſory. Whereupon it was adjudged for the plaintiff.

Case 19.

Jaxon *againſt* Tanner.

Entire damages may be given for different ſets of *actionable* words ſpoken to different perſons at different times.

Vide poſt. 328.

Godb. 343.

ACTION FOR WORDS; for that he ſaid of the plaintiff, being a merchant, "Thou art a rogue and a beggarly fellow, "and I ſhall prove thee a bankrupt before the next Term:" and for that he ſaid afterwards, upon the ſame day, to one *John Harris* of the plaintiff, "Truſt him not, for he will be thy undoing." The defendant pleaded not guilty; and it was found for the plaintiff, and entire damages given by the jury.

Moor, 141. Cro. Eliz. 329. 788. See 3. Bac. Abr. 7. *in notis.*

Whereupon

Jaxon *againſt* Tanner.

Whereupon it was moved in arreſt of judgment by Holborn, that theſe words are alledged to be at ſeveral times: and for the words ſpoken the firſt time, the action may lie; but for the words ſpoken afterwards, the action lies not; and damages being entire, there can be no judgment: for the Court ſhall intend, that damages were given as well for the ſecond as for the firſt ſpeaking, when both iſſues are found for the plaintiff; but for words ſpoken at one time if damages be found, the Court ſhall intend they were given for the words only which are actionable, and not for the other.

Dougl. 377. 730, 3. Term Rep. 433. 779.

But the Court conceived in this caſe, that the words ſpoken at the ſecond time are as well actionable as the words of the firſt, and aggravate the firſt words; for when he firſt called him "a bank-"rupt, and I will prove him a bankrupt, &c." it lies for theſe words (but not for the words "rogue" or "beggarly fellow"): and when afterwards he ſaid to another, "Truſt him not, for he will undo "thee," they tend to the ſame ſenſe. Whereupon judgment was given for the plaintiff, unleſs other matter were ſhewn to the Court. —And being another day moved again, Richardson, *Chief Juſtice*, conceived, there was not any difference betwixt theſe words, "I will prove thee a bankrupt," and "I ſhall prove thee a bank-"rupt by ſuch a time." And he held, that the action well lies for any of the ſaid words.

Facy *againſt* Long.

Case 20.

Tithes ſhall not be paid for cattle reared for the ſuſtenance of the family, nor for cattle reared for the pail or plough.

PROHIBITION. A queſtion was moved, Whether tithes ſhall be paid for the depaſturing of ſheep for one's family only, and not to be ſold? For the preſcription was, that he paid the tenth pound of wool of all ſheep ſold there and depaſtured.

But Maynard moved, that notwithſtanding the payment of the tenth fleece, he ſhould pay for the paſturage of his ſheep eaten in his houſe.

But all the Court held, that tithes ſhall not be paid for any cattle eaten in the family, no more than for cattle reared for pail or plough: and a precedent was cited in *Hilary Term*, 9. *Jac.* 1. that ſo it was reſolved.

S.C Jones, 254. S.C. 1. Roll. Ab. 647. Win. 33. 2. Inſt. 651. Moor, 909. 3. Com. Dig. 97.

Cro. Eliz. 446. 476. Cro. Jac. 430. 576. Hard. 184. 5. Bac. Ab. 55, 56. Bunb. 90. 313. Gilbert's Rep. in Equity, 231.

Margaret Hinde *againſt* The Biſhop of Cheſter.

Case 21.

By 21. *Hen.* 8. c. 6. the biſhop of Cheſter was entitled to a mortuary on the death of every prieſt dying within the dioceſe.

PROHIBITION: Becauſe the defendant ſued in the conſiſtory court of *Cheſter*, before the commiſſary there, for a mortuary, after the death of *William Hinde*, a prieſt of the ſaid dioceſe; ſurmiſing, that by cuſtom there he ought to have for a mortuary, after the death of every prieſt dying within the ſaid archdeaconry of *Cheſter*, the beſt horſe or mare, his ſaddle, bridle, ſpurs, his beſt gown or cloak, his beſt hat, his beſt upper garment under his gown, his tippet, his beſt ſignet or ring, as to the biſhop *de debito conſuet. fore ſupponitur* (*a*); and recites the ſtatute of 21. *Hen.* 8. c. 6. concerning mortuaries. And ſhe avers, that there is no ſuch cuſ-

(*a*) By 28. Geo. 2. c. 6. this mortuary is directed to ceaſe; and an equivalent is ſettled upon the biſhop in its ſtead. 2. Bl. Com. 426.

tom

HYNDE *against* THE BISHOP of CHESTER.

Upon a ſuit in the ſpiritual court for a mortuary by cuſtom, if the defendant plead "no ſuch cuſtom," and the Court refuſe the plea, a PROHIBITION ſhall go.

3. Mod. 268. 12. Co. 76. 2. Inſt. 491. Carth. 97. 4. Com. Dig. 506. Dougl. 378. 1. Term Rep. 552. 3. Term Rep. 3. H. Bl. Rep. 100.

tom there; and that ſhe had paid a mortuary to the parſon of *Bumberry*; and that after a prohibition the defendant had proſecuted his ſuit there.

NOY, *Attorney General*, moved, *for the defendant*, that conſultation ſhould be granted.

THE FIRST QUESTION was, This ſuit being for a mortuary in the archdeaconry of *Cheſter*, and the doubt, whether there were a cuſtom in that place to have ſuch things for a mortuary, Whether this be juſt cauſe of prohibition; or, that this ſuit being for a mortuary, is merely triable in the ſpiritual court? And it was alledged on the defendant's part, that this is merely triable in the ſpiritual court upon the ſtatute of *artic. cleri*; which ſaith, that where a ſuit is for a mortuary, prohibition ſhall not be granted: and in *Fitz. Nat. Brev.* 53. & 51. 10. *Hen.* 4. 2. where cuſtom is alledged for the payment of a mortuary, it is ſaid this cuſtom is triable in court chriſtian: and 13. *Rich.* 2. "*Juriſdiction*," 20. *Kelloway, fol.* 110. where ſuit is for a mortuary, conſultation ſhall be awarded.—But CALTHROP, *for the plaintiff*, moved againſt it, and ſaid, True it is, before the 21. *Hen.* 8. c. 6. if there were a ſuit in court chriſtian for a mortuary, conſultation ſhould be granted, *vide Doct. & Student, fol.* 176. and the *Book of Entries*; but the courſe is otherwiſe ſince that ſtatute.

After a declaration in prohibition, conſultation ſhall not be granted upon motion before plea or demurrer.

12. Co. 41. Hob. 192. Yelv. 79. B. R. H. 292. Cowp. 424.

BUT as to THE SECOND QUESTION, Whether conſultation ſhall be granted upon a motion, without anſwering to the prohibition? (and that was moved by NOY, That it ſhall, becauſe the ſuit being for a mortuary, there is no cauſe of prohibition; therefore conſultation ſhould be granted;)

JONES and WHITLOCK, *Juſtices*, were of opinion, that a prohibition ought not to have been granted, it being a ſuit for a mortuary: and although it was alledged it is now grantable upon the ſtatute of 21. *Hen.* 8. c. 6. they conceived, that by the proviſo therein mortuaries ſhall be paid in the archdeaconry of *Cheſter*, as before they have been accuſtomed; ſo it is out of the ſtatute: and the cuſtom for payment of mortuaries being in queſtion, is triable in court chriſtian: and although prohibition hath been unduly granted, yet it is no diſcretion in the Court to grant a conſultation upon motion without anſwering.

Cro. Eliz. 151.

But RICHARDSON, *Chief Juſtice*, and MYSELF held, that no conſultation ought to be granted: for the ſurmiſe in the prohibition is good, that there is no ſuch cuſtom to have ſuch goods for mortuaries, as is ſurmiſed; and that may well be tried by the courſe of the common law: for now the ſtatute appoints what ſhall be paid for mortuaries; and that in the ſaid places, in *Wales* and the archdeaconry of *Cheſter*, ſuch mortuaries ſhall be paid as have been accuſtomed, which is iſſuable and triable at the common law; eſpecially as this caſe is, wherein the plaintiff pretends and ſurmiſeth, that ſhe paid the mortuaries to the parſon of *Bumberry*, in which pariſh the ſaid prieſt inhabited; and that there is no ſuch cuſtom ſhe ſhould pay it to the archdeacon.

SECONDLY, We held, as this caſe is, no conſultation ought to be granted upon motion, without anſwering to the prohibition: becauſe the plaintiff in her declaration upon the prohibition ſhews, that

that the defendant hath ſued after the prohibition, which is a contempt, and ought to be anſwered; but peradventure in ſome caſes, when the prohibition appears in itſelf to be unduly granted, the defendant before appearance having committed no contempt in proſecuting thereof, may move to have a conſultation: whereupon it was appointed that the defendant ſhould plead or demur, and then the Court would give judgment upon the record before them, &c.

HINDE *againſt* THE BISHOP of CHESTER.

Mills *againſt* Mills.

CASE 22.

ACTION on the caſe, in the nature of a conſpiracy. Whereas the defendant with *J. S. falſo et malitioſe* conſpired to procure him to be indicted of ſuch a felony; that the defendant *falſo et malitioſe* ſuch a day procured him to be indicted, whereby he was much vexed, &c. After verdict, in arreſt of judgment, LITTLETON moved, that this action lies not, becauſe he did not ſue the other as well as the defendant; for conſpiracy ought to be againſt two.—*Sed non allocatur*; for an action upon the caſe may well be againſt one of them. Whereupon it was adjudged for the plaintiff.

An action on the caſe *in the nature of a conſpiracy* will lie againſt one defendant only.

F.N.B. 114. 116. Carth. 416. 1. Roll. Ab. 111. Cro. Jac. 194. 3. Mod. 220. Term Rep. 231.

Str. 144. 193. 1227. 1. Wilſ. 210. 12. Mod. 209. 1. Hawk. P.C. c. 72. ſ. 8. 2.

Walſh *againſt* Biſhop.

CASE 23.

Hilary Term, 6. *Car.* 1. *Roll* 954.

ERROR of a judgment in the common pleas, in treſpaſs of battery againſt two. They plead ſeveral pleas, the one *not guilty*, the other a *juſtification*; whereupon ſeveral iſſues were joined, and the jury found both iſſues for the plaintiff, and aſſeſs ſeveral damages, but joint coſts. Afterwards the plaintiff cauſed a *nolle proſequi* to be entered againſt the one, which was entered accordingly; and takes judgment againſt the other for the damages found againſt him, and the coſts.

In battery againſt two, if they plead ſeveral pleas, and both found for the plaintiff, he may enter *nolle proſequi* againſt one, and take judgment againſt the other.—*Vide* S. C. poſt. 243.

LITTLETON aſſigned error, Becauſe a *nolle proſequi* againſt the one before judgment entered is *quaſi* a releaſe to him, which ſhall enure to the other, and abate the writ for both; but if he had prayed judgment againſt the one, and had it, then he might enter a *nolle proſequi* againſt the other. And that entry of a *nolle proſequi* againſt the one after judgment ſhall not abate the writ, nor be a releaſe to the other; and for that was cited 14. *Edw.* 4. *pl.* 6.

2. Roll. Ab. 101. Hob. 70. 180. Carth. 19. 3. Mod. 101. 2. Lev. 33. 2. Com. Dig. 621. 1. Wilſ. 89. 1. Burr. 358. Dougl. 169. 3. Term Rep. 511. H. Bl. Rep. C. B. 108.

But MR. GRIMSTON anſwered, that this *nolle proſequi* is not a releaſe in itſelf, but an acknowledgement that he will not proceed as againſt the one; which the plaintiff may well do in treſpaſs, where the defendants ſever themſelves by pleading, and there be ſeveral verdicts againſt them: and ſo there be divers precedents where *nolle proſequi's* are entered as well before judgment as after; and ſo is the Old Book of Entries.

THE COURT thereupon would adviſe (*a*).

(*a*) It was moved again in Hilary Term, and the judgment of the common pleas affirmed. Poſt. 243.

Mounſon

Case 24.

Mounſon *againſt* Cleyton.

Trinity Term, 6. *Car.* 1. *Roll* 1343.

If a man taken in execution be reſcued, the plaintiff may have a new *ca. ſa.* or a *ſcire facias* on the judgment. Ante, 75. 109. 153. Poſt. 255.

SCIRE FACIAS to have execution upon a judgment in debt. The defendant pleads, that at another time the plaintiff had ſued execution by a *capias ad ſatisfaciendum*, and the defendant was taken in execution. The plaintiff replies, that true it is he ſued a *capias ad ſatisfaciendum*, and the defendant was taken thereupon, but he preſently reſcued himſelf and eſcaped.

The defendant demurs thereupon.

29. Aſſ. pl. 41. 5. Co. 44. 52. Moor, 57. 354. F. N. B. 246. Hobart, 60. Yelv. 52. Cro. Eliz. 478. Cro. Jac. 486. 2. Jones, 21. 97. 1. Vent. 269. Lutw. 1266. 1. Show. 174. 249. Carth. 282. 3. Com. Dig. 285.

And ALL THE COURT conceived, that the replication was good; for the plaintiff, not having the fruit of his execution, may have a new execution; and it is not reaſon the defendant ſhould take advantage *de ſon tort demeſne*: and as there is no cauſe for the defendant to have an *audita querela* when he is eſcaped and taken again, unleſs it be for a voluntary permiſſion by the ſheriff; ſo there is not any bar for him to have new execution: and although it is no good return upon a *capias ad ſatisfaciendum*, that the defendant reſcued himſelf (for the ſheriff at his own peril ought to have kept him), nor any plea in debt upon an eſcape, yet the party himſelf ſhall never take advantage of his own tortious act. And as it was ſaid, that it appears the plaintiff might have his remedy as well againſt the ſheriff as againſt the defendant; ſo it was anſwered, that doth not take away his remedy againſt the party who eſcaped, unleſs the defendant ſhews that the plaintiff had ſued the ſheriff and recovered againſt him; and it may be the ſheriff here is dead, and then no power to ſue his executors. Wherefore, it appearing that the remedy remains againſt the party himſelf, rule was given that judgment ſhould be entered for the plaintiff, unleſs, &c.

See 8. & 9. Will. 3. c. 27.

Case 25.

Wells, Adminiſtrator *durante minore ætate* of J. S. *againſt* Some.

In an action by an adminiſtrator *durante minore, &c.* a general averment that he was under age is ſufficient after verdict. 2. Roll. Rep. 466. Lutw. 632.

ACCOUNT againſt the defendant as bailiff and receiver; and ſhews only that he was bailiff of ſuch a manor, &c. The defendant pleads to the iſſue; and found againſt him: and it was moved in arreſt of the judgment.

THE FIRST EXCEPTION taken was, Becauſe he doth not ſhew that *J. S.* is within the age of ſeventeen years; and it may be he is under age, and yet above the age of ſeventeen years.—*Sed non allocatur*; for it ſhall not be intended, unleſs it be ſhewn, that he was above the age of ſeventeen years when the other hath admitted him to bring the action, and pleaded to the iſſue.

Account by an adminiſtrator *durante minore ætate* againſt a *bailiff* and *receiver*, is good, without ſhewing any charge againſt him as receiver. Brownl. 46. Ab. 19. 2. Bac. Ab. 385.

THE SECOND EXCEPTION, that the declaration is not good, was, Becauſe he charges him by the name of bailiff and receiver; and afterwards doth not ſhew any charge againſt him as receiver.—*Sed non allocatur*: for it is the more for the defendant's benefit. Whereupon it was adjudged for the plaintiff.

5. Co. 29. a. Cro. Eliz. 602. 5. Mod. 395. 2. Vent. 378. Yelv. 128. Lut. 632. 2. Roll. Rep. 466. 2. Sid. 40. 60. Hob. 251. 1. Bac.

Hilary

Hilary Term,

7. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

William Noy, *Eſq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Milles *againſt* Milles.

CASE 1.

On a contract to pay *a ſum of money* at different inſtalments, *an aſſumpſit* will lie on non-payment of *the firſt* inſtalment; and damages are no bar to a ſecond action; but it is otherwiſe in debt.

Sed vide Wilſ. 80. Dyer, 113. Co. Lit. 292. b. Owen, 42. Moor, 13. Bendl. 57. 4. Co. 94. b. 1. Roll. Ab. 29. Cro. Eliz. 118. 776. 2. Leon. 107. Li. Rep. 61. Poſt. 350. Andr. 370. 3. Com. Dig. 107, 108. 3. Bac. Ab. 711, 712.

ASSUMPSIT; for that the defendant, in conſideration of marriage, promiſed to the plaintiff twenty pounds, to be paid in manner and form following, *viz.* ten pounds at *Michaelmas* 1631, and ten pounds reſidue at *Michaelmas* 1632; and for the non-payment of the firſt ten pounds he brings the action.

The defendant pleads *non aſſumpſit*; and found againſt him, to his damages twenty pounds, and coſts two pounds thirteen ſhillings and fourpence.

And it was moved by MR. GRIMSTON in arreſt of judgment,

FIRST, That the action lies not till after *Michaelmas* 1632; and compared it to an action of debt grounded upon a ſingle bill for ten pounds to be paid, *viz.* five pounds at our *Lady-day*, and five pounds at *Michaelmas*; debt lies not until the laſt day.

SECONDLY, Here are damages given for the laſt day, which is not yet come.

But JONES, WHITLOCK, and MYSELF (RICHARDSON, *Chief Juſtice*, being abſent) agreed, that the action well lies before the laſt day, being an action upon promiſe or covenant: for the breach is immediately for the firſt ten pounds not being paid at the day; and for this breach the action well lies. But we held it to be otherwiſe in debt, the contract or bill being entire.

SECONDLY, We agreed, that the damages of twenty pounds ſhall be intended given for the firſt ten pounds, and that he ſhould have ſo much damages for non-payment thereof only, without any reſpect to the ten pounds which is not yet due (*a*).—Whereupon it was adjudged for the plaintiff.

(*a*) *Sed vide* Cro. Jac. 505.

Cooks *againſt* Douze.

CASE 2.

A promiſe in conſideration of forbearance *per paululum tempus*, is good. *Sed vide* poſt. 273. 438. 1. Leon. 61. 1. Sid. 45. Cro. Jac. 250. 683. 1. Com. Dig. 168.

ERROR of a judgment in *Winton:* where the plaintiff declared, That he lent to one *Wheeler* twenty pounds at the defendant's requeſt, and that the defendant, in conſideration the plaintiff would reſt content and forbear the ſaid money *per paululum tempus*, promiſed upon requeſt he would pay; and alledges in fact, that he forbore *per paululum tempus*, and required payment; and the defendant had not yet paid, although he required payment at ſuch a day.

After *non aſſumpſit* pleaded, and verdict and judgment given for the plaintiff, it was aſſigned for error, That to forbear *per paululum tempus*

Cooks *againſt* Douze.

tempus is not any conſideration, becauſe there is not any certainty therein.

Foster ſaid, there were divers precedents that it hath been adjudged to be ill.

But ALL THE JUSTICES, *abſente* RICHARDSON, held, that it was well enough: for when the money was lent to *Wheeler*, and long forborn, and the plaintiff upon the defendant's requeſt agreed for a longer time, and to accept of the payment from him when he ſhould be required; and alledges in fact, that he forbore till the day of his action, and that he requeſted, &c. it is ſufficient. Whereupon rule was given that judgment ſhould be affirmed.

Case 3.

Berry *againſt* Heard.

Hilary Term, 19. *Jac.* 1. *Roll* 1444.

If a ſtranger cut down a timber-tree during the continuance of a term, the leſſor may maintain *trover* againſt him for it.—And *Quære*, If he may not, at his election, have *trover* or *waſte* againſt the leſſee?

Jones, 255. 2. Roll. Ab. 119. Bendl. 141. 11. Co. 81. b. Poſt. 274. Moor, 19. Allen, 82. 2. Com. Dig. 218, 219. 601. 3. Peere Will. 267. 2. Term Rep. 55.

ACTION OF TROVER AND CONVERSION of a load of bark or rind of oak. Upon not guilty pleaded, a ſpecial verdict was found, that this bark was the bark of an oak, being timber growing in ſuch land, whereof the plaintiff was ſeiſed in fee, and had let the land whereupon the tree grew to *J. S.* for years; and that the defendant during the ſaid term, which yet continues, entered and cut down the ſaid tree, being a timber-tree, and carried away the ſaid load of bark thereof, and converted the ſame to his own uſe. And if, &c.

The ſole queſtion herein was, If a ſtranger cut down a timber-tree in the time of leſſee for years, and carry that or the bark thereof away, Whether the leſſor during the ſaid term may have an action of *trover* for it, or be put to take his remedy againſt the leſſee by an action of *waſte*; and the leſſee to have his remedy by action of *treſpaſs* or *trover* againſt him who cut it down? or, Whether the leſſor, at his election, may puniſh the one or the other?

This caſe being long depending, and divers arguments therein before I came to the bench, and the Judges differing in their opinions, it was argued after I came to the bench.

Jones and Whitlock ſaid, that they always were of opinion, that the action well lies for the leſſor, and that he hath election to ſue the leſſee for the waſte, or him who cut down the tree; for the tree being timber, the general property is always in the leſſor notwithſtanding his leaſe; and the leſſee for years hath but a ſpecial property therein, to have the ſhadow and fruits thereof as long as it is growing, and not otherwiſe: and when it is ſevered from the land, the property which the leſſee had therein is loſt; and then the property thereof is only to the leſſor (*a*), ſo as he may have an action for the carrying it away, or an action of *trover and converſion*; and that ſuch property which he hath by the common law always remains in him, notwithſtanding the ſtatute of *Glouceſter*, which gives him the action of waſte to puniſh ſuch cutting down. And they ſaid, that Lee, *Chief Juſtice*, was of their opinion; but that Doderidge was always of the contrary. And they ſaid, a rule was once given that judgment ſhould be for the plaintiff; and they marvelled it was not entered.

(*a*) See the caſe of Bewick *v.* Whitfield, 3. Peere Will. 267. Co. Lit. 220. note (1) Moor, 327. 11. Co. 84. 1. Roll. Ab. 183.

And

And now RICHARDSON, *Chief Juſtice*, ſaid, he was of their opinion, that the property of the timber-tree, when it is cut down, is no longer in the leſſee: for his intereſt is in it only during the time it is growing upon the land, and that afterwards it remains only in the leſſor, ſo as he alone ſhall have an action of *trover* for the carrying it away. BERRY *againſt* HEARD.

But I was always of the contrary opinion, that the leſſee ſolely during the term ought to have an action for the carrying away of it, and not the leſſor; for the poſſeſſion and property is veſted in him during the term, and is not loſt by his cutting down, nor by the cutting down of a ſtranger; and that he is chargeable in an action of waſte to anſwer treble damages to the leſſor; and ſo the leſſor having ſufficient remedy, it is reaſon the leſſee ſhould have the action againſt him who cuts it down and carries it away, to have recompence; and the recovery by the leſſor in an action of *trover* is no bar for the leſſee to plead in an action of waſte: nor is it reaſon a recovery of ſingle damages againſt him who cut down the ſaid timber ſhould be a bar in waſte, where he is to recover treble damages; therefore the leſſor during the term ought to have his remedy only againſt the leſſee, and he over againſt him who cut down the ſaid tree. But notwithſtanding, upon their three opinions, it was adjudged for the plaintiff. *See* 4. *Co.* 62. 5. *Co.* 76. 11. *Co.* 48. & 81. *Dyer*, 90. 44. *Edw.* 3. *pl.* 5. 10. *Hen.* 7. *pl.* 2. *Co. Lit.* 220. a. Co. Lit. 54. a.

Walſh *againſt* Biſhop.

CASE 4.

Vide ante, 239.

THIS Caſe was now argued again by LITTLETON, *Recorder of London, for the plaintiff* in the writ of error, and by HENDEN, *Serjeant, for the defendant*. The errors inſiſted upon were, In treſpaſs againſt two, if a *joint* verdict and *ſeveral* damages be given, the plaintiff may enter a *nolle proſequi* as to one, and ſign judgment againſt the other.

FIRST, That the jury ought not to have given ſeveral, but joint damages.

SECONDLY, That the entry of a *nolle proſequi* before judgment is *quaſi* a confeſſion of his action to be falſe againſt one, or a releaſe to him, which being before judgment is, as it were, a releaſe to both.

But THE COURT, *abſente* JONES, conceived, that there was not error in either of them: for, FIRST, when the plaintiff hath relinquiſhed his ſuit againſt the one, although in truth there ought to have been inquiſition but once of the damages, and not ſeverally, yet it is not material when no advantage is taken thereof. And as to the SECOND, it is not a confeſſion that this writ is falſe, nor an abſolute releaſe to the one, but it is, as it were, an agreement that he will not proceed againſt the one; and his acknowledgment is an abſolute bar as to him, and proceeding may be againſt the other: as if one pleads a plea, and there is a demurrer thereupon, and the other pleads to the iſſue, and it is tried, it is an uſual courſe to enter a *nolle proſequi* againſt him who pleaded the plea whereupon the demurrer was, and to pray judgment againſt the other; ſo where they ſever themſelves by ſeveral pleas, he may enter a *nolle proſequi* againſt the one, and have his judgment againſt the other. And divers precedents being ſhewed on both ſides, that ſuch judgments have been ſo entered, the judgment was affirmed. *Vide* 18. *Edw.* 4. *pl.* 26. 5. *Hen.* 5. *pl.* 1. *The Book of Entries*, 585. 589. 5. *Hen.* 7. *pl.* 24. 11. *Hen.* 7. *pl.* 5. Ante, 239. 11. Co. 7. a. Cro. Car. 551. Hob. 70. Cro. Eliz. 86. Carth. 19. Salk. 457. Wilſ. 89. Strange, 910. 1140. 2. Com. Dig. 621. 5. Com. Dig. 89. Dougl. 169. note (56). 3. Term Rep. 511. H. Bl. Rep. C. B. 108.

Copland

Case 5.

Copland *against* Pyatt.

Trinity Term, 6. *Car.* 1. *Roll* 687.

Lands conveyed to the uſe of huſband and wife, and the heirs of *her* body by the *father of the wife*, in conſideration of the marriage, and of a ſum of money paid by the *father of the huſband*, is not a jointure within the reſtraint of the 11. *Hen.* 7. c. 20. upon the death of the huſband without iſſue.

S.C. Jones, 254. Piggot, 80. Plowd. 464. Dyer, 64. b. Hob. 332. Cro. Eliz. 2. Cro. Jac. 475. 2. Inſt. 681. Palm. 21. 32. 216. W. Jones, 13. 18. Mod. 512. 2. Bac. Ab. 92. *in notis.* Mr. Butler's note (1) Co. Lit. 373. and Co. Lit. 365. 3. Com. Dig. 71. Cruiſe on Recov. 155.

EJECTMENT. Upon a ſpecial verdict the caſe was, That *William Bertram* ſeiſed in fee, having three daughters, by indenture betwixt him and *Robert Bagley*, in conſideration of four hundred pounds paid by the ſaid *Robert Bagley*, and in conſideration of a marriage had betwixt *Robert Bagley*, ſon and heir of the ſaid *Robert Bagley*, and *Margaret* eldeſt daughter of the ſaid *William Bertram*, and preferment of the blood of the ſaid *William Bertram*, covenanted to ſtand ſeiſed to the uſe of the ſaid *Robert* the ſon and the ſaid *Margaret* his wife, and the heirs of her body; and for default of ſuch iſſue, to the uſe of his other daughters, and the heirs of their bodies, the remainder to the heirs of the ſaid *William*. The huſband dieth having no iſſue, and *Margaret* his wife by fine conveyed it to the defendant, upon whom the iſſue entered, as for a forfeiture by the ſtatute of 11. *Hen.* 7. c. 20.

The queſtion was, Whether it were a forfeiture or not?

And IT WAS RESOLVED, that ſhe was not a jointreſs within that ſtatute, notwithſtanding the four hundred pounds paid by *Robert Bagley* the father; for the land firſt moved from *William Bertram* the wife's father, and the preferment of the blood of *William Bertram* ſhews the intent, that the huſband's heirs ſhould not be preferred, but the wife's; for the meaning of the makers of that law was only to diſenable women who have any eſtate in dower, or for life, or in tail, jointly with their huſbands, or only to themſelves, of the inheritance or purchaſe of their huſbands, or given to them by the anceſtors of their huſbands, or other perſons ſeiſed to the uſe of ſuch huſbands or their anceſtors, when they become ſole, or with any other after-taken huſband, from making ſuch alienations, whereby the heirs of ſuch huſbands might, and before the making of that law, were frequently diſinherited. But in this caſe the advancement is by the anceſtors of the wife, and is not of the purchaſe of the huſband or his anceſtors, nor aſſured by the huſband or his anceſtors. And in this caſe *The Biſhop of Exeter's Caſe* was cited, who, in conſideration of kindred to the woman, and ſervice done by the man, gave certain lands to them in tail: and it was adjudged, that the wife, after the death of the huſband, had no eſtate within the ſaid ſtatute of 11. *Hen.* 7. c. 20. and that ſhe might ſell it, becauſe the land came not from her huſband nor any of his anceſtors, nor from any ſeiſed to the uſe of her huſband or his anceſtors. And therefore it was adjudged for the defendant. *Vide Ware v. Walthew* (*a*), *Kinaſton v. Lloyd*, (*b*), and *Kirkman v. Thomſon* (*c*).

(*a*) Cro. Jac. 173. to 176. (*b*) Cro. Jac. 624. (*c*) Cro. Jac. 474.

Cas 6.

Meredith *against* Joans.

Eaſter Term, 6. *Car.* 1. *Roll* 53.

A limitation in the *habendum* of a deed to the uſe of the grantees and the heirs of their bodies, is an eſtate tail. Ante, 230, 231. Jones, 253. 9. Co. 47. Cro. Jac. 401. Co. Lit. 19. 1. Co. 122. 2. Co. 78. 2. Roll. Ab. 780. 3. Bulſt. 184. Com. Rep. 29.

ERROR of a judgment in *Flintſhire*. The error was aſſigned in point of law, *viz.* That judgment was given there upon a

ſpecial

special verdict for the plaintiff, where it ought to have been for the defendant. The case was, land was given to husband and wife, *habendum* to husband and wife to the use of them and the heirs of their bodies. The question there was, Whether it were an estate for life only, or an estate tail? And it was adjudged to be an estate tail. MEREDITH *against* JOANS.

LITTLETON, *Recorder of London*, now argued for the plaintiff in the writ of error, and CALTHROP for the defendant.

And ALL THE COURT, *absente* RICHARDSON, held, that the judgment ought to be affirmed; for they conceived, that this limitation in the *habendum*, "to the use of the grantees and the heirs "of their bodies," is as a limitation of the land itself, being all to one person, and is as if it had been said, "*habendum* to them "and to the heirs of their bodies;" and not like to the case 2. & 3. *Eliz. Dyer*, 186. for true it is, when the estate is limited to one or two, to the use of others and their heirs, the first estate is not enlarged by this implication, and the use cannot pass a greater estate. But here when the grant and *habendum* convey the estate, and the limitation of the use is to the same person, that shews the intent of the parties, and is a good limitation of the estate; for it is not an use divided from the estate, as where it is limited to a stranger, but the use and estate go together; wherefore it is all one as if the limitation had been "to them and the heirs of their bodies." And JONES said, that he knew many conveyances had been made in this manner, and twice brought in question, and adjudged to be an estate tail. Whereupon judgment was affirmed.

Swayn and Others *against* Stephens.

CASE 7.

Hilary Term, 6. *Car.* 1. *Roll* 1243.

TROVER AND CONVERSION of a ship and nine pieces of ; and declares, that 1. *March*, 21. *Jac.* 1. he was possessed of, and the same day lost, them, which came to the defendant's hand, who, 3. *October*, 3. *Car.* 1. converted them to his proper use. The defendant pleads the 21. *Jac.* 1. c. 16. of Limitation of Actions; and that the 20. *March*, 19. *Jac.* 1. *causa actionis accrevit*; so as not only *three years* and more are incurred since the parliament, but also *six years*, after the conversion, before any action commenced: *et hoc, &c.* The plaintiffs reply, that they were possessed of the said ship as of their proper goods, and so being possessed before the 20. *March*, 19. *Jac.* 1. viz. 1. *March*, 19. *Jac.* 1. they agreed at *London* aforesaid, *in parochiâ et wardâ prædictâ*, that the said defendant, as their servant, should transport the said ship and goods to *T.* in *Spain*, being parts beyond seas, and should afterwards restore them to the plaintiffs upon request; whereupon the defendant taking the said ship the said 1. *March*, 19. *Jac.* 1. transported her to the parts beyond seas, *viz.* to *T.* and 20. *March*, 19. *Jac.* 1. there sold the said ship and goods to persons unknown, and converted them to his proper use: and that the defendant, after the said conversion, remained *in partibus transmarinis usque* 1. *May*, 1. *Car.* 1. by reason of which stay they could not sue him *per legem terræ*: and that 1. *May*, 1. *Car.* 1. he returned;

In trover and conversion the plaintiff may reply, to a plea of the statute of Limitations, that the defendant transported the goods beyond the sea by consent, and that he afterwards *converted* them to his own use, and remained in parts beyond the seas, by reason of which the plaintiff could not sue him.

S.C. Jones, 252. 2. Term Rep. 462. 485. 756.

SWAYN and Others *againſt* STEPHENS.

returned; whereupon the firſt of *October*, 3. *Car.* 1. at *London*, they required him to deliver the ſaid ſhip and goods, which to do he refuſed, but the ſaid ſhip and goods, *ad tunc et ibidem*, converted and diſpoſed *prout ſuperius continetur: et hoc, &c.* And upon this replication the defendant demurs.

Trover is an action within the ſtatute of Limitations. Poſt. 333.

Jones, 252. 3. Mod. 111. 3. Bac. Abr. 513.

HENDEN, *Serjeant*, moved, that this action of *trover* is not within the ſtatute, but is omitted; for although at the firſt the words be, "actions of debt, detinue, actions upon *trover*, account, "&c. ſhall be brought within the time after limited," yet, in the percloſe, actions of *trover* are not mentioned. But ALL THE COURT conceived, although actions of *trover* are not mentioned in the percloſe, yet the words being, that "actions upon the caſe ſhall "be brought within ſix years, and actions for words within two "years," in thoſe general words of "actions upon the caſe" the action of *trover* is implied; wherefore it was not allowed.

Quære, If the ſtatute of Limitations operates while a debtor is abroad?

2. Lev. 143. Carth. 136. 3. Mod. 312. Show. 99. 2. Vern. 694. Wilſ. 134. See 5. Com. Dig. 533.

SECONDLY, Admitting the defendant was beyond ſeas for ſix years after the converſion, and did not return into *England*, the queſtion was, Whether the plaintiff had not liberty to bring the action at any time within ſix years after his return? for the proviſo is on the part of the plaintiff, if he be over the ſea at the time of the cauſe of action, that he ſhall have time after his return; and, by the ſame equity, it ſhall be ſo where the defendant is over the ſeas and cannot be ſued.---But that point THE COURT did not reſolve (*a*).

Requeſt and non-delivery of goods ſold abroad is a new converſion of them when the defendant comes to *England*. *Vide* poſt. 334.

THIRDLY, If this requeſt and non-delivery after his return be not a new converſion and cauſe of action, ſo that although he was barred before by the ſtatute of Limitation, Whether he ſhould not be hereby reſtored to that action? And JONES and WHITLOCK conceived that he ſhould, and that it may be well intended the goods came to his hands again after his ſale, and the demanding them of him, and his denial and converſion, is good cauſe of action. But *I* doubted thereof.

A variance in the *replication* from the *declaration* in an immaterial matter is no *departure*.

6. Com. Dig. 99. 102.

FOURTHLY, It was urged, that here the replication was a departure from the declaration; for by the declaration the plaintiffs ſuppoſe a caſual loſs and a *trover* by the defendant 1. *March*, 21. *Jac.* 1. but in the replication they ſuppoſe an agreement to tranſport the ſaid ſhip and goods, and afterwards to reſtore them to the plaintiffs, and that the defendant ſold and converted them to his own proper uſe the twentieth of *March*, 19. *Jac.* 1. and ſo a variation between the *declaration* and *replication* in the time and manner how the defendant had them. Alſo, by his own confeſſion, the converſion was made above ſix years before the action brought (*b*).

(*b*) This Caſe was moved again in *Michaelmas Term*, 5. *Car.* 1. and judgment entered for the plaintiff. Poſt. 335.

(*a*) By 4. Ann. c. 16. ſ. 19. if any, perſon, at the time any ſuch cauſe of action ſhall accrue, ſhall be beyond the ſeas, the perſon intitled to the action ſhall have the ſame times as are reſpectively mentioned in the ſtatute, after the return of ſuch perſon from beyond the ſeas.

Soutley

Soutley *againſt* Price.

CASE 8.

Hilary Term, 5. Car. 1. Roll 1276.

AN APPEAL OF MURDER was brought by *writ* awarded to the ſheriff of *Salop*, being the next county adjoining to that of *Montgomery* in *Wales*, for the murder of her huſband at *Montgomery*, in the county of *Montgomery*; and, on not guilty pleaded, it was tried by a jury of the county of *Salop* at the bar, the murder being foul, and the defendant found guilty.

An appeal of murder committed in *Wales* muſt be tried in the county where the fact was committed, and not in the next adjoining *Engliſh* county.

Staundf. 63. Fitz. Forf. 14. Dyer, 18. 46. 1. Hale, 157. 2. Hale, 163. 1. Hawk. P. C. 119. 2. Hawk. ch. 23. ſ. 35. 2. Inſt. 557. Cro. Jac. 692. 12. Co. 61. 1. Com. Dig. 119. 121. 366. 5. Com. Dig. 667. Dougl. 791. 2. Term Rep. 125.

It was moved in arreſt of judgment, that this writ of appeal ought to have been brought in the county of *Montgomery*, where the fact was committed, and not in any other county adjoining.

It was ſeveral times argued at the bar by HENDEN and BERKLEY, *Serjeants*, and LITTLETON, for the plaintiff, and by CHARLES JONES, *Serjeant*, LLOYD, and others, for the defendant.

ALL THE COURT reſolved, that the writ ſhould abate; for it is againſt a fundamental rule of law, that a trial for murder, by appeal or otherwiſe, ſhould be out of the county where it is committed; as 18. *Edw.* 3. *pl.* 32. 11. *Hen.* 4. 98. & *Stamford*, 9. And for this cauſe it was doubted at the common law, where a ſtroke was given in one county, and death enſued in another county, How it ſhould be tried? And to avoid this doubt the 2. *Edw.* 6. c. 24. was made. But it always was clear, that a fact in one county ought not to be tried in another: and although it hath been objected, there would be otherwiſe failure of juſtice, becauſe in *Wales breve domini regis non currit*; and this appeal is *quaſi* for the king, and where the king is party he may always ſue in any county adjoining, as in *quare impedit* for an advowſon in *Wales*, becauſe there they cannot write to the biſhop (*a*); yet it was anſwered, that *Wales* was a realm by itſelf, and diſtinct from the government of *England* (*b*), but afterwards united, and by the ſtatute of *Rutland* appointed by what laws it ſhall be governed, and by the 27. *Hen.* 8. c. 26. and 34. *Hen.* 8. c. 6. divided into counties, and expreſsly therein is ſet down how appeals ſhall be ſued there out of chancery, and ought not to be tried here by writs of appeal. But if he were here *in cuſtodiâ mareſchalli*, Whether he ſhould be ſued here by bill of appeal? they would not now reſolve.

(*a*) Jones, 255. 5. Com. Dig. 665.

It was alſo objected, that writs of appeal have been brought here for murder committed in *Sandwich*, which is within the *Cinque Ports*, *ubi breve domini regis non currit*, the writ ſuppoſing the murder to be committed at *Sandwich* in the county of *Kent*; and the defendant pleading that *Sandwich* was one of the *Cinque Ports*, upon demurrer the writ hath been adjudged good (*c*); and that ſo it ſhould be here.

To an appeal for murder committed at *Sandwich* it cannot be pleaded in abatement that *Sandwich* is one of the *Cinque Ports*. Poſt. 253. S. C. Yelv. 12. 1. Hale, 157.

THE COURT anſwered, There was a manifeſt difference betwixt the caſes; for there the appeal was brought within the county of

2. Inſt. 557. 4. Inſt. 223. Cro. Eliz. 910. 1. Sid. 66. 1. Com. Dig. 3. 367.

(*b*) See THE YEAR-BOOK, 11. *Hen.* 6. *pl.* 3. and 61.

(*c*) Criſp *v.* Verral, Cro. Eliz. 910. Yelv. 12.

SOUTLEY *againſt* PAICE.

Kent, and it was truly ſuppoſed done at *Sandwich*; for the *Cinque Ports*, though they are a liberty made by act of parliament, yet they always remain parcel of the county, and ſo the appeal well brought; but here, by the plaintiff's own ſhewing, the act was done in another county out of the county of *Salop*, wherefore the appeal lies not.

Sed vide Rex v. Morris, 1. Mod. 64. and 68. and the caſes there cited.

THE COURT alſo much relied on this, that no precedent can be ſhewn where appeals have been allowed in counties adjoining for murder committed in *Wales*. It is true, that in this court a writ of appeal was brought againſt one *Thomas* (*a*), in the county of *Salop*, for murder in the county of *Montgomery*; *ſcd nihil inde venit*. But divers precedents were ſhewn to the contrary, *viz.* one in *Trinity Term*, 5. *Edw.* 3. *Roll* 9. where an appeal was brought here for a fact in *Wales*, the judgment was, that for that cauſe *eat inde ſine die*; and *Trinity Term*, 18. *Hen.* 6. *Roll ultimo*, an appeal of rape was brought here for a fact in *Wales*, and adjudged, that he ſhall not be put to anſwer, becauſe it was committed in *Wales*. And two other precedents were produced, the one in *Eaſter Term*, 10. *Edw.* 2. *Roll* 110.; the other in *Eaſter Term*, 5. *Edw.* 4. *Roll* 34.

ALL THE COURT hereupon reſolved, that this writ of appeal lies not; and therefore adjudged for the defendant.

A *certiorari* does not lie to remove an *appeal of murder* from the grand ſeſſion in *Wales*.

NOTE, The ſtatute of 26. *Hen.* 8. c. 6. allows that *indictments* may be in counties next adjoining, but there is not any mention therein of *appeals*; and for this reaſon *certioraries* have been granted, to remove indictments out of the grand ſeſſions, but never writs of appeal.

Poſt 332. — 1. 704. Cowp. Roll. Ab. 394. Cro. Jac. 484. Poph. 144. 1. Salk. 146. 8. Mod. 135. Stra. 551. 751. 2. Hawk. P. C. 407. Dougl. 749.

(*a*) 24. & 25. Eliz.

CASE 9.

Lancelot *againſt* Allen.

Trinity Term, 3. *Car.* 1. *Roll* 1037.

The citizens of *London* may, by virtue of the cuſtom confirmed by the charter of *Edward* the third, grant lands in mortmain without licence from the crown.

Poſt. 455. 517. 576.

Hern, 189. S.C. Jones, 251. 4. Co. 112. Priv. Lond. 156. 2. Inſt. 21.

TRESPASS for entering into an houſe in *Saint Olave's*, *Hart-ſtreet*. Upon not guilty pleaded, a ſpecial verdict was found, that "one *Cromer*, being ſeiſed in fee of an houſe in *Saint Swithin's*, and of divers houſes in *Saint Olave's*, in *London* (where the cuſtom being alſo found, that every citizen or freeman may deviſe his lands in *mortmain*), deviſed the tenement in *Saint Swithin's* to the parſon of *Saint Martin Orgar's* and his ſucceſſors, to find annually one to ſing maſs in the church of *Saint Orgar's* every day, and that there ſhould be paid to him ten marks by the year: and he deviſed his houſes in *Saint Olave's*, whereof the land in queſtion is parcel, to his wife for life, to find an anniverſary, and to expend thereupon divers ſums amounting to 3l. 6s. 8d. and after her death to the ſaid parſon and his ſucceſſors finding the ſaid anniverſary; and further appointed to the churchwardens 6s. 8d. for their pains to ſee it obſerved; *et quod ſuperfuerit* over and above the ſaid charges, he wills, ſhall remain in the hands of the churchwarden of *Saint Martin Orgar's*, "*ad manutenendum capellanum prædictum, et ad emendandum et reparandum dictam eccleſiam de* SAINT MARTIN ORGAR *et ornamenta ejuſdem eccleſiæ, ſecundum eorum diſcretionem*:

"PROVISO

LANCELOT *againſt* ALLEN.

" PROVISO *ſemper, quòd ſi contigerit prædict. terras et tenementa in* " SAINT SWITHIN'S *in aliquo caſu fore minoris valoris quàm decem* " *marcis, per quod capellanus prædictus ut prædictum eſt inveniri non* " *poterit, tunc volo quòd totum quod de prædictâ annuali ſummâ de decem* " *marcis haberi et levari non poterit, haberetur et levaretur de proficuis* " *tenementorum prædictorum in* SAINT OLAVE'S" by the ſaid parſon and his ſucceſſors, " *ad opus et ſuſtentationem dicti capellani in per-* " *petuum.*" And they find, that the tenements in *Saint Swithin*'s, at the time of the will making, and before, were but of the yearly value of 6l. 5s.; and the tenements in *Saint Olave*'s, at the time of the will, and always after until the time of the ſtatute of 1. *Edw.* 6. c. 14. (*a*), were of the value of 24l. 10s. *per annum*, and that the prieſt and the ſaid other uſes were employed and maintained until the making of the ſaid ſtatute of 1. *Edw.* 6. c. 14. and that the plaintiff claims as leſſee of the parſon, and the defendant claims under the patentee of the king.

(*a*) 4. Co. 104. Cro. Eliz. 449. 799.

The queſtion was, Whether the parſon of *St. Martin*'s *Orgar* hath title to thoſe tenements of *Saint Olave's?*

A deviſe of lands to find a prieſt, with a ſalary of five pounds a-year, and the remainder to be employed toward the repair of the church, is within the ſtatutes of 23. *Hen.* 8. c. 10. and 1. *Edw.* 6. c. 14. and given to the king; for the *ſuperſtitious uſe* is certain, but the *charitable uſe* uncertain. Poſt. 456.

And after argument at the bar it was held by ALL THE COURT, that if this PROVISO had not been added the lands had been clearly given to the king by the ſtatute of 1. *Edw.* 6. c. 14. as lands given for the maintenance of a prieſt; for the clauſe, for thoſe lands of *Saint Olave*'s, was limited: " *quod ſuperfuerit,*" after the anniverſary maintained, ſhall be " *ad manutenendum capellanum prædictum,* " *et reparandum eccleſiam et ornamenta ejuſdem eccleſiæ.*" The ſuperſtitious uſe being certain, and the good uſe, VIZ. " *ad reparandum* " *eccleſiam et ornamenta ejuſdem eccleſiæ,*" uncertain, the ſuperſtitious uſe certain ſhall cauſe that all ſhall be given to the king.

But RICHARDSON, *Chief Juſtice*, JONES, and WHITLOCK, conceived, that by the PROVISO it appears it was his intent the prieſt ſhould have but ten marks, and what was wanting in the value thereof ſhould be ſupplied out of the tenements of *Saint Olave*'s, ſo that nothing is given to the prieſt but the ten marks; therefore the houſes in *Saint Olave*'s were not given to the king.

But I doubted thereof, conceiving all to be given to the king, for the PROVISO doth not alter it; for in the firſt clauſe all the profits of thoſe houſes, after the anniverſary paid, are given for the maintenance of a prieſt indefinitely, and to the reparation of the church, &c., and the PROVISO doth not abridge it, for that appoints, what is wanting in *Saint Swithin*'s ſhall be made up out of *Saint Olave*'s, and ſo to pay the ten marks firſt appointed, ſo as he ſhall have the ſaid ten marks *de certo* out of both the ſaid tenements in *Saint Swithin*'s and *Saint Olave*'s. But that doth not take away the clauſe, that the reſidue of the profits of the tenements in *Saint Olave*'s ſhall be to the parſon, " *ad ſuſtentationem dicti capel-* " *lani.*" And of this opinion was HYDE, *Chief Juſtice*, when he lived; but it being moved again in SIR THOMAS RICHARDSON's time, he agreeing with JONES and WHITLOCK in their opinions, it was adjudged for the plaintiff, that theſe houſes were not given to the king.

Moor, 131. 264. 4. Co. 106. 111. 116. Godb. 309. Dyer, 337. 1. Roll Rep. 417. 2. Vern. 226. Litch. 38. 1. Salk. 163.

8. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

The King *againſt* Sir James Wingfield and Others.

CASE 3.

INFORMATION by the king's attorney againſt *Sir James Wingfield*, *Sir Francis Bodenham*, *James Bedell*, *Thomas Brady*, *John Hampden*, and *John Neale*, For that they had made an aſſault upon *the ſheriff of Middleſex*, in ſerving an execution upon the ſaid *Sir James Wingfield*, by which means he eſcaped and reſcued himſelf. They all pleaded not guilty; and now upon the trial all except *Bedell* made default, and he appeared.

In a criminal information againſt ſeveral the default of one ſhall not prejudice the others. Ante. 209.

NOY, *Attorney General*, urged ſtrongly, that it was no reaſon but that the default of the others ſhould bind him, for it is one intire ſuit, and they all have joined in a plea, and therefore may not now be ſevered.

But ALL THE COURT held, becauſe the ſuit was for a criminal offence, although they all pleaded *not guilty*, yet it is to every one of them *quaſi* ſeveral, and the default of one ſhall not be the default of the others, nor the confeſſion of any of them ſhall prejudice the others; whereupon the inqueſt was taken by default only againſt the four which appeared not; and they all were found guilty except *Bedell*, whom the jury acquitted.

The king's attorney now praying judgment, THE COURT ſeverally delivered their opinions, and gave judgment, that *Sir James Wingfield*, being the principal offender, ſhould pay five hundred pounds; and *Brady* five hundred marks, becauſe it appeared upon the evidence he drew his ſword and wounded the ſheriff grievouſly, and by that means *Sir James Wingfield* eſcaped into the ſaid *Neale*'s houſe; and againſt the ſaid *Neale*, becauſe he kept out the ſheriff, ſhutting the door againſt him, and not ſuffering him to ſearch for the priſoner, whereby he eſcaped, one hundred and eighty pounds; and againſt *Sir Francis Bodenham*, becauſe he was the means of conveying away the ſaid priſoner to *Lincoln's Inn*, five hundred marks; and againſt the ſaid *John Hambden*, becauſe he was aiding with the ſaid *Sir Francis Bodenham*, two hundred pounds.

Judgment on an information for aſſaulting a ſheriff in ſerving a writ of execution.

And IT WAS RESOLVED, that ſuch fines aſſeſſed in court by judgment upon an information cannot be afterwards qualified or mitigated (*a*).

The Court cannot mitigate a fine after the Term.

(*a*) 1. Inſt. 260. Raym. 376.—*Sed vide* 2. Hawk. P. C. ch. 48. ſ. 10. *contra*, during the Term in which it was impoſed. See alſo Vent. 336. Salk. 55.

Case 2.

The King *against* The Mayor and Commonalty of London.

By the common law, if any homicide be committed, or dangerous wound given, in a walled town, and the offender be suffered to escape, the town shall be amerced.

Sum. 90. 2. Hale, 73. 75. 155. 3. Inst. 53. 4. Inst. 183. 3. Leon. 207. Dyer, 210. Dalton, 204. 139. 326. 3. Com. Dig. 179. 1. Hawk. P. C. 298. 2. Hawk. P. C. 115, 116.

INFORMATION was brought against the mayor and commonalty of *London*, Whereas they were incorporated by that name, and it was a walled city, and recites the statute of 1. *Edw.* 4. c. 1. that the mayor for the time, and all who have been mayors, should be justices of the peace within the city, and that the sheriffs are made amongst themselves, and coroners appointed by themselves, and that by law they ought to suppress riots and all unlawful assemblies, notwithstanding in *June*, 4. *Car.* 1. in the day-time, that one JOHN LAMB, *alias dictus* DOCTOR LAMB, was slain in a tumult, and none of the offenders taken, nor any person known or indicted for that felony. Upon this information the mayor and commonalty appeared, and confessed the offence, *et posuerunt se in gratiam curiæ, &c.* for which they were amerced to fifteen hundred marks; for it was conceived to be an offence at the common law to suffer such a crime to be committed in a walled town *tempore diurno*, and none of the offenders to be known or indicted. *Vide* 3. *Edw.* 3. *cor.* 299. 22. *Edw.* 3. *cor.* 238. 8. *Edw.* 2. *cor.* 425. *Stamf.* 33. 7. *Co.* 7. 3. *Hen.* 7. 15. *Dyer*, 210. And NOY, *Attorney General*, shewed a record in *Michaelmas Term*, 18. *Edw.* 3. *Roll* 132. of an indictment of a town in *Devonshire* for suffering an assembly, as it were, to hold assises in mockery of justice; and the 21. *Hen.* 6. a presentment before FORTESCUE against the town of *Norwich*, that there was a great riot in *Norwich*, and one *Gladman* took upon him to be king, and went with a crown of paper in a riotous manner to the priory of *Norwich*, *&c.* and although it appears not upon the roll *quid inde venit*, yet *per rot. patent.* 27. *Hen.* 6. *memb.* 13. their liberties for that cause were seized, and regranted.

Case 3.

Tyndal's Case.

A writ of *certiorari* lies from the king's bench to the mayor and jurats of any of the *Cinque Ports*, to remove an indictment of felony. See S. C. post. 264. 291.

S. C. 1. Roll. Abr. 395. 4. Inst. 223. Cro. Eliz. 910 Cro. Jac. 543. Palm. 54. 3. Com. Dig. 336. 2. Hawk. P. C. 400. 434.

A CERTIORARI was awarded to the mayor of *Hithe* and the jurats there, being one of the *Cinque Ports*, to remove an indictment of felony, *viz.* buggery, against one *Tyndal* supposed to be committed there. The writ was not returned upon pretence of a liberty or privilege belonging to the *Cinque Ports*, that the king's writ out of any of his courts shall not be awarded to them, but ought to be directed, "To the Lord Warden of the *Cinque* "*Ports*," who ought to make the warrant to them to execute it; and because the writ was brought to them, and no warrant from the warden, they would not return it: whereupon an *alias certiorari* being awarded and delivered to "The mayor and jurats" in court, upon oath made that they said they would not return it, and for that they imprisoned the messenger who brought it in their common gaol, and that one *Knight*, a jurat, spake contemptuously of the

writ

writ being under green wax (the ſeal of the Court), ſaying, "This "is no time for green plums." Upon theſe contempts proved by ſeveral oaths, AN ATTACHMENT was prayed againſt them and awarded. TYNDAL'S CASE. L. Raym. 346.

NOY, *the King's Attorney*, being in court, now ſaid, that for this contempt he would exhibit an information: for ſuch contempts againſt the king's meſſenger who brought the king's writ are contempts againſt the king's perſon, and ſuch contempts ought to be ſeverely puniſhed; for it is termed *dimicare contra regem et non diſceptare*: and he ſhewed a record in court, 33. *Edw.* 1. *Roll* 101. where *the Biſhop of Durham* pretended he had ſuch privileges that the king's writ ought not to run there, and becauſe one brought the king's writ thither, impriſoned him: and for this cauſe an information being exhibited againſt him, and, the offence proved, it was adjudged he ſhould pay a fine to the king, *et quod capiatur*, and ſhould loſe his liberties for his time: and the entry in the roll is, that he ſhall loſe his liberties, becauſe *juſtum eſt quod in eo quod peccat, in eo puniatur*: and he ſhewed another precedent in *Trinity Term* 21. *Edw.* 3. *Roll* 46. or 460. where in the common pleas a prohibition was awarded to *the Biſhop of Norwich*, and he excommunicated the party who brought the writ, and thereupon the party brought his action on the caſe, and declares all this matter; and he being found guilty, it was adjudged, that his temporalities ſhould be ſeized until he abſolved the party, and ſatisfied the king for that contempt, and that the party ſhould recover againſt him for damages ten thouſand pounds; and upon that judgment the biſhop brought a writ of error in the king's bench; and this judgment was affirmed. And thereupon the Attorney-general moved for the king, that in this caſe a new writ might be awarded, and they to make a return thereupon as they ſhall be adviſed. And it was ſaid, although in civil pleas they have ſuch juriſdiction (for their court is ancient time whereof, &c. and confirmed by act of parliament), yet it cannot extend to what they do as juſtices of peace, which begun within time of memory: and that MAGNA CHARTA, c. 9. and *Art. ſup. Chart.* c. 7. are only, that they ſhall have "*conſuetudines ſuas, &c.*" and that cannot be extended to matters of the crown, with which they meddle as commiſſioners of the peace or *oyer* and *terminer*, which are all ſubject to the juriſdiction of this court. R. 406. Ante, 147. Cro. Jac. 543.

In Michaelmas Term, 8. *Car.* 1. a *certiorari* was prayed to be awarded to "The mayor and juſtices of *Dover*," being within the *Cinque Ports*, to remove an indictment of felony againſt one *Ringden*, of *Dover*, who was indicted there of buggery.—HENDEN, *Serjeant*, moved, that this ſhould be awarded, and directed "To "the Lord Warden of the *Cinque-Ports*," as other proceſs is uſually directed. But, upon debate, ALL THE COURT agreed, that it ſhould be immediately directed to the juſtices before whom the indictment was; for they held plea of it as juſtices of the peace by virtue of their commiſſions, and not by their ancient charters or preſcription; which was awarded accordingly. A *certiorari* to remove an indictment from juſtices within the *Cinque Ports* ſhall be directed immediately to them. Poſt. 264. 1. Roll. Ab. 395. 2, Hawk. P. C. 400. 434.

Rhemes

Case 4.

Rhemes *againſt* Humphreys and his Wife.

Hilary Term, 7. Car. 1. Roll 1202.

Trover lies againſt huſband and wife for a converſion by the wife only; but if it be alledged *ad uſum ipſorum*, it is bad. Poſt. 494, 495. R. 226. Jones, 264. 1. Roll. Ab. 6. 348. Yelv. 165. 1. Brownl. 3. 1. Vez. 24. Cro. Jac. 5. 661. Stiles, 115. Cro. Car. 495.

TROVER AND CONVERSION of goods by huſband and wife, *ad uſum ipſorum*. They pleaded not guilty; and both were found guilty, and damages aſſeſſed.

It was now moved in arreſt of judgment, that the action lies not againſt the huſband and wife jointly for converſion *to their uſes* during the coverture: for when they join, it is the act of the huſband only, and the wife cannot convert to her own uſe; but an action of *trover* well lies for converſion by the wife before the coverture, or by the wife only during the coverture; for ſhe may do a *tort* ſolely, and the huſband ſhall be ſued with her, but not where ſhe joins with the huſband.

THE COURT therefore would adviſe thereof; and afterward, in *Trinity Term*, 8. *Car.* 1. it was adjudged for the defendants. 38. *Edw.* 3. *pl.* 1. 13. *Rich.* 2. "*Breve*," 644.

Mar. 94. 154, Carth. 251. Andrews, 242. 1. Com. Dig. 220. 5. Com. Dig. 194.

Case 5.

Boulton *againſt* Banks.

Hilary Term, 7. Car. 1. Roll 276.

A declaration in treſpaſs *on the caſe*, reciting the writ to be in a *plea of treſpaſs* generally, is good. Poſt. 325. Hob. 180. Allen, 84. 3. Lev. 338.

ACTION UPON THE CASE. Whereas the defendant kept a maſtiff, *ſciens* that he was *aſſuetus ad mordendum porcos*, and that the plaintiff was poſſeſſed of a ſow great with pigs, that the ſaid maſtiff bit the ſaid ſow ſo as ſhe died of the biting.

After verdict, upon not guilty pleaded, it was moved in arreſt of judgment, FIRST, That the recital of the bill is in a plea of *treſpaſs*, and the declaration is in a plea of *treſpaſs on the caſe*.—*Sed non allocatur*.

An action on the caſe will lie for knowingly keeping a dog uſed to bite *and kill* ſwine. See poſt. 487. D. & S. ch. 42. 8. Rep. 22. Ney's Max. 92. man, 534.

THE SECOND EXCEPTION, That to declare of a dog *ad mordendum porcos aſſuetus* is not good, for it is proper for a dog to hunt hogs out of the ground; and his biting of the hogs is neceſſary, and not like to the keeping of a dog which uſually bites ſheep or other cattle.

But THE COURT, *abſente* RICHARDSON, conceived the action well lies; for it is not lawful to keep dogs to bite *and kill* ſwine. Wherefore it was adjudged for the plaintiff.

4. Co. 18. 3. Bl. Com. 153. 12. Mod. 332. 335. Ld. Ray. 608. 1583. 1. Freeman, 534. Strange, 1264. 3. Bl. Com. 153.

Case 6.

Jeſſon *againſt* Laxon.

Trinity Term, 7. Car. 1. Roll 258.

A continuance in an inferior court *until the next court day* is ſufficiently certain. 2. Jac. 314. 357. 571. 1. Roll Ab. 484. Shower, 95. 319. Dyer, 262. 1. Mod. 81.

ERROR of a judgment in *Coventry*. The error aſſigned was, Becauſe the judgment, being by *nihil dicit* in debt, was diſcontinued: for the continuance was taken until the next court, which is uncertain; for it ought to be to a day certain, as 9. *Eliz. Dyer*, 262.

But it was anſwered, that in *Coventry* there is no day certain for the keeping of their courts; for ſometimes it is held within a fortnight, ſometimes within three weeks.

JONES, *Juſtice*, ſaid, all their proceedings in *Wales* are adjourned until the next great ſeſſions, and none knows when the great ſeſ-

2. Ld. Raym. 854. 5. Com. Dig. 178. Cowper, 21.

ſions

ſions ſhall be held. And this error was aſſigned and over-ruled in the caſe of *Bythell v. Parry*; and ſo RICHARDSON, JONES, and WHITLOCK, conceived it ſhould be here; but I doubted thereof. The judgment was affirmed.

Jesson *againſt* Laxon. 1. Roll. Ab. 484.

Mounſon *againſt* Cleyton.

CASE 7.

SCIRE FACIAS to have execution upon a judgment in debt. The defendant pleads, that, at another time before, the plaintiff had ſued a *capias ad ſatisfaciendum*, and that the defendant was arreſted, and in execution thereupon, and demands judgment, &c. The plaintiff replies, true it is, ſuch a writ of *capias ad ſatisfaciendum* iſſued, and that the defendant was arreſted thereupon, and made reſcous, and eſcaped; therefore he ſued this *ſcire facias* to have execution, being after the year and day.

Scire facias may be had on a judgment againſt a defendant who has eſcaped, notwithſtanding the plaintiff confeſſes him in execution on a *ca. ſa.* Ante, 75. 240.

Upon this the defendant demurred, pretending, becauſe the plaintiff had confeſſed the defendant was once in execution, he could not afterward take a new execution. 1. Roll. Ab. 901.

But THE COURT reſolved, that the *ſcire facias* was well maintainable; for when he had not the benefit of his execution, it was as none, and the defendant ſhall never take advantage of his own wrong by his eſcape; and peradventure the ſheriff is dead, ſo the plaintiff hath not any remedy againſt him. Whereupon it was adjudged for the plaintiff, that he ſhould have execution.

Trinity

Trinity Term,

8. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir James Whitlock, *Knt.* } *Juſtices.*
Sir George Croke, *Knt.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Butler *againſt* The Preſident of the College of Phyſicians.

Eaſter Term, 7. Car. 1. Roll 519.

An action QUI TAM *may be* "QUI TAM *pro* "*domino rege* "*quam pro* "*ſeipſo*;" but an information ſhall only ſay "QUI TAM *pro* "*rege quam* "*pro ſeipſo* "*ſequitur.*" Poſt. 336. Jones, 261. 2. Bulſt. 185. Moor, 64. 1. Com. Dig.

ERROR of a judgment on a demurrer in the common pleas.

THE FIRST ERROR aſſigned was, Becauſe the record was, "*Ad reſpondendum domino regi et Preſidenti Collegii, &c.* QUI "TAM *pro domino rege, quam pro ſeipſo ſequitur quod reddat eis ſexa-* "*ginta libras; unde idem preſidens* QUI TAM, *&c. dicit, &c.*;" whereas the action ought to have been brought by the preſident only *qui tam, &c.* and not by the king and preſident, &c.—*Sed non allocatur*: for being an original writ, the writ is moſt often ſo, and ſometimes the other way: and they conceived it good both ways. But informations are always, that the party *qui tam* for the king *quam pro ſeipſo ſequitur.*

Dyer, 227. Plowd. 77. New Bk. Ent. 160. Old Bk. Ent. 143. 373. Ld. Ray. 153. 228. 1. Bac. Abr. 38. 2. Hawk. P. C. 379.

An *action* for practiſing phyſic contrary to the charter 10. *Hen.* 8. confirmed by ſtatute 14. *Hen.* 8.—The defendant *pleads* the 34. *Hen.* 8. authoriſing the practice he had uſed.—The plaintiff *replies*, that by 1. *Mary*, c. 9. the charter and the ſtatute of 10. & 14. *Hen.* 8. were confirmed, "any "other ſtatute "or ordinance "to the con- "trary not- "withſtand- "ing."—This is no *departure* from the declaration. Poſt. 334. 1. Lev. 81. c.

THE SECOND ERROR was, That the replication was a departure from the count; for the count ſets forth, that KING HENRY THE EIGHTH *anno decimo regni ſui incorporavit* (and by the ſtatute of 14. *Hen.* 8. c. . *confirmavit*) the College of Phyſicians by the name of "The preſident," &c. "that no man ſhould practiſe phyſic "in *London*, or within ſeven miles, without licence under the ſeal "of the college, upon the penalty of five pounds for every month "that he ſo practiſed, the one moiety to the king, the other to the "preſident of the college, to the uſe of the ſaid college:" and for that the defendant, not being allowed, &c. had practiſed phyſic for twelve months in *London*, the ſaid action was brought, &c. The defendant pleads the ſtatute of 34. *Hen.* 8. c. 8. "That every one "who hath ſcience and experience of the nature of herbs, roots, "and waters, or of the operation of the ſame by ſpeculation or "practice, may miniſter or apply in and to any *outward* ſore, un- "come, wound, apoſthumations, outward ſwelling, or diſeaſe, "any herb, ointments, baths, pultees, or implaiſters, according "to their cunning, experience, and knowledge, &c. or drink for "the ſtone and ſtrangury or agues in any part of the realm, with- "out ſuit, vexation, &c. any act or ſtatute to the contrary notwith- "ſtanding." And that he having ſkill in the nature of herbs, roots, and waters, by ſpeculation and practice, applied to perſons requiring his ſkill herbs, ointments, baths, drinks, &c. to their

Yelv. 13. 1. Saund. 83. 189. Cro. Jac. 121. Co. Lit. 304. a. Plowd. 105. b. Com. Dig. 102. 4. Bac. Abr. 123.

fores,

BUTLER against THE PRESIDENT of the COLLEGE of PHYSICIANS.

fores, uncomes, wounds, and for the ſtone and ſtrangury, or agues, and to all other diſeaſes in the ſaid ſtatute mentioned, *prout ei bene licuit. Et quoad aliquam aliam practiſutionem ſeu facultatem medicinæ aliter vel alio modo, quod non eſt culpabilis. Et de hoc ponit, &c.* And makes his averment, *et hoc paratus eſt verificare.* The plaintiff replies, and ſhews the ſtatute of 1. *Mary*, c. 9. which confirms the charter of 10. *Hen.* 8. and the ſtatute of 14. *Hen.* 8. and appoints that "it ſhall be in force notwithſtanding any ſtatute or ordinance "to the contrary." And upon this it was demurred, becauſe it is a departure; for it entitles him by another act, *viz.* the 1. *Mary*, c. 9. which is not mentioned in the count; and therefore it was aſſigned for error. But ALL THE COURT here conceived, that it is no departure, becauſe it fortifies the count, and is as to revive the ſtatute of 14. *Hen.* 8. if it were repealed in this particular by the 34. *Hen.* 8. c. 8. And for that the caſe of *Wood v. Hawkſhead* (*a*) was ſhewn to the Court, in *Michaelmas Term*, 42. & 43. *Eliz. Roll* 397. where the preſident of the College of *All-Souls* brings an action upon the caſe for taking toll, and ſhews a charter of 26. *Hen.* 6. to be diſcharged of toll, the defendant pleaded the act of reſumption of liberties granted by *Henry* the ſixth, and ſo the liberty gone. The plaintiff pleaded a reviver of them by the ſtatute of 4. *Hen.* 7.: and IT WAS HELD to be no departure, but as it were a confeſſion and avoiding.

(*a*) Yelv. 13. Lit. Rep. 215.

THE THIRD and principal ERROR aſſigned was, If the ſtatute of 34. *Hen.* 8. c. 8. be not repealed by the ſtatute of 1. *Mary*, c. 9.; and if not, Whether the defendant hath made a ſufficient juſtification? And *quoad* that, Whether the ſaid ſtatute be repealed? THE COURT was not reſolved.—But RICHARDSON, *Chief Juſtice*, conceived, it was repealed by 1. *Mary*, c. 9. by the general words, "any act or ſtatute to the contrary (of the act of 14. *Hen.* 8.) not-"withſtanding." But I conceived, that the act of 34. *Hen.* 8. c. 8. not mentioning the ſtatute of 14. *Hen.* 8. was for *phyſicians*; but the part of the act of 34. *Hen.* 8. c. 8. was concerning *chirurgeons*, and their applying outward medicines to outward ſores and diſeaſes, and drinks only for the ſtone, ſtraugullion, and ague; that ſtatute was never intended to be taken away by the act of 1. *Mary*, c. 9.—But to this point JONES and WHITLOCK would not deliver their opinions.

Quære, If 34. *Hen.* 8. c. 8. is repealed by the general words of 1. *Mary*, c. 9. "any act or er-"dinance to the "contrary not-"withſtand-"ing."

Lit. Rep. 169. 212. Cro. Jac. 221. Jones, 261. 4. Com. Dig. 404.

But admitting the 34. *Hen.* 8. c. 8. be in force, yet THEY ALL RESOLVED, the defendant's plea was naught, and not warranted by the ſtatute; for he pleads, that "he applied and miniſtered medi-"cines, plaiſters, drinks, *ulceribus, morbis, et maladiis, calculo, ſtran-"guria, febribus, et aliis in ſtatuto mentionatis*;" ſo he leaves out the principal word in the ſtatute, *viz.* "*externis*:" and doth not ſcfer and ſhew, that he miniſtered potions for the "ſtone, ſtrangullion, "or ague," as the ſtatute appoints to theſe three diſeaſes only, and to no other. And by his plea his potions may be miniſtered to any other ſickneſs; wherefore they all held his plea was naught for this cauſe, and that judgment was well given againſt him.—Whereupon judgment was affirmed.

S. C. Lit. 163.

Walker

Case 2.

Walker *against* Sir John Lamb.

Trinity Term, 7. Car. 1. Roll 374.

Special verdict on an action on the case for disturbance in the offices, 1. Of official of an archdeaconry. 2. Of commissary to a bishop: and adjudged, that a grant of them in reversion is good. Post. 279.

2. Roll. Ab. 154. Jones, 264. 311. 2. Lev. 245. 4. Mod. 17. Hard 357. 11. Co. 4.

ACTION ON THE CASE, for disturbance of the plaintiff in exercising his offices of the officialty of the archdeaconry of *Leicester*, granted by the archdeacon of *Leicester*, and of the office of commissary of the bishop of *Lincoln*.

Upon NOT GUILTY pleaded, a special verdict was found, that these were ancient offices, the one granted by the archdeacon of *Leicester*, the other by the bishop of *Lincoln*, and were offices of judicature always granted to one person *for life* until 1609; and in the 30. *Eliz.* were so granted to *Dr. Chippendale*; and after, in 1609, those offices were granted to *Dr. Chippendale* and to one *Edward Clerk* for their lives, no surrender being actually made by *Dr. Chippendale*. Afterward, 1614, both offices were granted, the one by the archdeacon, the other by the bishop, to *Sir John Lamb* and to the said *Edward Clerk*; and those grants confirmed by the dean and chapter: that in 1622, *Dr. Chippendale* died; and afterwards the archdeacon who granted that office, and the bishop who granted the office of commissary, died; and the bishop of *Lincoln* who now is, and the now archdeacon by several patents granted those offices to the plaintiff, who was at the time of the grant of the patent a lay-person, and bachelor of the civil law only: and they find the statute of 37. *Hen.* 8. c. 17. that lay-persons, married or unmarried, being doctors of the civil law, may be commissaries, officials, scribes, or registers; and that the plaintiff exercised those offices, and the defendant disturbed him. *Et si super, &c.*

Upon this the matter, being argued at the bar, was reduced only to two questions:

The 37. *Hen.* 8. c. 17. does not restrain a lay person and batchelor of the civil law only from holding the offices of commissary, chancellor, or official to a bishop. Post. 279. 555. Jones, 264. Poph. 37. Cro. Eliz. 315. Salk. 134. 3. Com. Dig. 149. 251. Ld. Ray. 49. 51. 853.

FIRST, Whether the patent to the plaintiff, being a lay person and not a doctor of the law, were good, or restrained by the statute of 37. *Hen.* 8. c. 17.? And as to that point, ALL THE COURT conceived the grant was good; for the statute doth not restrain any such grant: and it is but an affirmance of the common law, where it was doubted if a lay or married person might have such offices; and to avoid such doubts this statute was made, which explains, that such grants were good enough; and it is but an affirmative statute, and there is no restriction therein. And although the statute saith, that doctors of the law (though lay persons or married) shall have such offices, yet that is not any restriction that none others should have them but doctors of the law: and the statute mentions as well registers and scribes as commissaries, and that a doctor of the law shall have them; yet in common experience such persons as are merely lay and not doctors have had such offices. And upon this very point was a case in this court of *Pratt v. Stock* (*a*), where, upon demurrer, this statute was pleaded against the plaintiff to whom the commissaryship was granted, being but a bachelor of law, and he having granted administration, the grant was adjudged good; and the *Bk. of Entries*, 484. and 489. was allowed good. Wherefore they resolved the grant was well enough.

(*a*) Hilary, 35. Eliz. Roll 181. Cro. Eliz. 315.

And

And IT WAS ALSO RESOLVED, that where an officer for life accepts of another grant of the ſame office to him and to another, it is not any ſurrender of the firſt grant.

WALKER *againſt* SIR J. LAMB. Ante, 198.

THE SECOND POINT was, Whether the office of the officialty of the archdeaconry and the office of the commiſſary of the biſhop be grantable by the 1. *Eliz.* c. 19. and 13. *Eliz.* c. 10. becauſe it was pretended they were not parcel of the poſſeſſions of the biſhoprick or archdeaconry, ſo as they could have any profits by them, and then the ſtatute doth not reſtrain the grants of them? But ALL THE COURT reſolved, they were within the words and intent of the ſtatutes; for they are hereditaments (*a*), and are pertaining unto them: and that a grant of thoſe offices to two, where they were only grantable to one for life, and being granted in reverſion, is a void grant by the ſtatutes againſt the ſucceſſors; for the ſtatutes reſtrain all grants of any thing to be avoidable againſt the ſucceſſor, beſides grants of neceſſity and leaſes for three lives or one-and-twenty years, where the ancient rent is reſerved: and all other grants, as well of offices as of other things, not warranted by the ſtatutes, are made void as againſt the ſucceſſors. 10. *Co.* 60. *The Biſhop of Saliſbury's Caſe.* 5. *Co.* 14. and a caſe of *Vaughan v. Crompton*, 14. *Jac.* 1. at the aſſizes before the juſtices of aſſiſe for the office of the regiſterſhip in *Suffolk*; and in *Johns v. Powell* for the regiſter's place of *Hereford*, where it was adjudged, that ſuch offices granted in reverſion were void. Whereupon rule was given that judgment ſhould be entered for the plaintiff, unleſs other cauſe were ſhewn. And afterward being moved again, judgment was given for the plaintiff.

The ſtatutes of 1. *Eliz.* c. 19. and 13. *Eliz.* c. 10. reſtrain biſhops and archdeacons from granting the offices above-mentioned, ſo as to bind their ſucceſſors for a longer term than one life, unleſs *uſually* granted in reverſion.

10. Co. 60.
5. Co. 14.
Cro. Eliz. 440.
637.
Cro. Car. 49.
557.
1. And. 244.
Jones, 264.
Bridg. 29. 31.
Ley, 71.
2. Lev. 137.
4. Mod. 17.
Duke, 139.
Co. Lit. 44. 1. Burr. 219. 3. Com. Dig. 250. 3. Bac. Abr. 723.

(*a*) By 5. Geo. 3. c. 17. Leaſes for three lives, or twenty-one years, by eccleſiaſtical perſons, of incorporeal hereditaments which lie in grant and not in livery, are declared good.

Tredymmock *againſt* Perryman.

CASE 3.

Michaelmas Term, 7. *Car.* 1. *Roll* 76.

ERROR of a judgment in *Cornwall* in debt upon an obligation. The error aſſigned was, Becauſe the trial of the iſſue joined there was by ſix jurats only.

A cuſtom to try cauſes in an inferior court by *ſix jurors* inſtead of *twelve* is bad.

ROLLE, *for the defendant*, moved, that it is not error; for it is returned that he tried it there by ſix *ſecundum conſuetudinem ibidem à tempore, &c.* before uſed; and the court being by preſcription, the trial then by the cuſtom may be by ſix: and there is multitude of records in twenty ſeveral courts in *Cornwall* where trials may be by ſix, by cuſtoms there uſed; wherefore if it ſhould be reverſed, many others ſhould be reverſed.

1. Roll. Ab. 564.
3. Keb. 326.
1. Sid. 233.
See Co. Lit. 155. a. note (3).
Dougl. 204.

But ALL THE COURT held, that ſuch a cuſtom is void, and againſt the common law; and there cannot be an exemption of perſons from being jurors, unleſs there be ſufficient jurors beſides the perſons exempted to make trials.—And JONES ſaid, although in ſome parts of *Wales* there be ſuch trials by *ſix only*, it is by reaſon of an act of parliament of 34. & 35. *Hen.* 8. c. 26. f. 74. (*a*), which

(*a*) *Vide* 3. Geo. 2. c. 25. f. 9.

appoints,

TREDYNMOCK *against* PERRYMAN.

appoints, that such trials may be by six only where the custom hath been so; which proves that, when they were united to *England* and to be governed by the laws here, such trials could not be, unless they had been so provided for by parliament. Whereupon the judgment was here reversed.

CASE 4.

Major *against* Brandwood.

Hilary Term, 5. *Car.* 1. *Roll* 643.

The lord may at his election *distrain* or *seize* for *heriot service*; and, upon replevin, the avowry need not shew the particular thing to which he is entitled as a *heriot*; but if he *seize*, he can only take the identical thing.

S. C. Hutton, 176. Co. Copy. f. 25. Plowd. 96. Moor, 540. Cro. Eliz. 590. Bendl. 47. 1. And. 299. Lutw. 1367. Salk. 356. 2. *Hen.* 7. 155. 27. Ass. 24. Kely. 167. Kit. 134. 3. Mod. 231. 3. Bl. Com. 15. Gilb. Ten. 248. 2. Com. Dig. 518. 3. Bac. Abr. 52. Ed. Ray. 169. 308. 2. Espin. Dig. 42.

REPLEVIN of an ox taken, &c. The defendant makes conusance as bailiff of *John Brandwood*, for that he was seised in fee of the manor of *D.* and that one *Smith* was seised in fee of such a tenement holden of the said manor by *rent and heriot service*, payable after the death of the tenant, and that *Smith* died possessed *de animalibus et catallis*; and because the *heriot* was not paid, he, by the command of the said *John Brandwood*, distrained, and so made conusance. The issue was upon the *tenure*; and found for the defendant.

Exception was now taken in arrest of judgment, because he doth not shew what was the best beast, which he demanded, nor the kind thereof, nor the price of it: for this cause HYDE moved, that the avowry was ill, for it is uncertain what thing the defendant should have, or how he shall be satisfied if he should have return. And he said, all the precedents are in point, that he ought to shew what the heriot is when he demands the price thereof. 8. *Co.* 103. *Talbert's Case*, *Plowd.* 94. *Bk. of Ent.* 584.

But HUTCHINSON said, when the lord distrains, it is because the heriot is eloigned, and therefore he cannot seize it; so then he cannot shew what is the best beast: and for an heriot service it is at the lord's election either to distrain or to seize it, if he can find it, yet seize he cannot, unless the proper beast of the tenant only; but he may distrain any man's beasts which are upon the land, and retain them until the heriot be satisfied. And he said, there were divers precedents in the common pleas, where he avows without shewing what was the best beast, or any price thereof; and it would be inconvenient to enforce the avowant to shew it, for peradventure he doth not know, or ever saw it. *Vide* 24. *Edw.* 3. *pl.* 72. 44. *Edw.* 3. *pl.* 13.

Afterwards it was adjudged for the avowant.

Jones, 300. Hob. 176. Hutton, 4.

THIS CASE was moved again, *Michaelmas Term*, 8. *Car.* 1. by GERMYN, that the *avowry* was not well made, because it doth not appear what beast he should have for the heriot, nor of what value, the return being irrepleviable; nor can the plaintiff know what to offer to have again his cattle.—But ALL THE FOUR JUSTICES present agreed, that the avowry is good enough: for peradventure the avowant doth not know what was the best beast, and the plaintiff having done wrong by his eloignment, he at his peril ought to tender sufficient recompence: and that the avowry was good, there were shewn two precedents, the one in *Trinity Term*, 18. *Eliz. Roll* 506. *Dicker v. Higgens*, and the other in *Trinity Term*, 13. *Jac.* 1. *Roll* 1148.

Hixe

Hixe *againſt* Hollingſhed.

CASE 5.

Hilary Term, 7. *Car.* 1. *Roll* 765.

ERROR of a judgment in the common pleas in an action upon the caſe for words: "She is a bawd, and hath bewitched him "by witchcraft and ſorcery."

An action lies for ſaying, "She "is *a bawd*, and "hath *bewitched* "me." *Vide* ante, 229. Poſt. 324. 1. Roll. Ab. 44. 45.

GERMYN, *for the plaintiff* in the writ of error, moved, that theſe words are not actionable: for to call one "bawd," no action lies at the common law; but to ſay that "ſhe keeps a houſe of bawdry," is actionable at the common law; and that the judgment paſſed *ſub ſilentio* in the common pleas.

But it was held by JONES and MYSELF, that the action well lies for the laſt words, "and hath bewitched him, &c.;" but for the firſt words it was doubted. Wherefore, *cæteris abſentibus*, a rule was given that judgment ſhould be affirmed.

See the 1. Jac. 1. c. 12. and 9. Geo. 2. c. 5.

Mead *againſt* Perkins.

CASE 6.

ERROR of a judgment in the common pleas in an action for words: where the plaintiff *Perkins* declared, That he was an attorney of the common pleas, and of the ſheriff's court in *London*; and that the defendant ſpake theſe ſcandalous words of the plaintiff: "He (*præfatum* the plaintiff *innuendo*) is a cozener, and cozens his "clients in the ſheriff's court of *London*, and was for that cauſe "diſcharged of that court." The defendant pleaded not guilty; and found againſt him, and judgment; and the error aſſigned, That the words are not actionable.—But THE COURT held, they were ſcandalous, and touched him in his profeſſion. And judgment was affirmed.

To charge an attorney with having cozened his clients, is actionable. Cro Jac. 586. 4. Term Rep. 366.

Ellis *againſt* Johnſon.

CASE 7.

Trinity Term, 7. *Car.* 1. *Roll* 1039.

ERROR of a judgment in *D.* an inferior court. The error aſſigned, Becauſe after an *habeas corpus cum cauſâ* was ſued out of this court, and delivered to the mayor and principal officer of that court, and acceptance and allowance thereof, they notwithſtanding proceeded to trial and judgment. The defendant pleaded *in nullo eſt erratum.*

If an inferior court proceed after ſervice and allowance of *habeas corpus*, they are liable to attachment, and proceedings are *coram non judice*. 2. Roll. Ab. 495. 8. Co. 145. Cro. Eliz. 33. Cro. Jac. 42. 2. Jones, 209. 2. Mod. 195. 3. Mod. 85. Skin. 244. Salk. 140. 148. 352. P. C. 417.

GERMYN now moved, that this is not error, becauſe he doth not alledge the *habeas corpus* to be upon record; ſo as the error now aſſigned is not triable.

But IT WAS HELD, that that proceeding after the *habeas corpus* delivered is an error, and *coram non judice*, which is confeſſed by the pleading *in nullo eſt erratum*: and if it were not true that it was delivered to the mayor and allowed, it ought to have been denied, and is triable *per pais*; but becauſe it is not denied, it is a manifeſt error. Whereupon the judgment was reverſed.

Strange, 398. 814. Tidd's Practice, 176. 7. Mod. 138. 12. Mod. 666. 2. Hawk. Cowp. 672. 1. Term Rep. 279. 3. Term Rep. 390.

See 21. Jac. 1. c. 23. ſ. 2.

Case 8.

Wilſon *againſt* Chambers.

Trover lies for not delivering a *bond*; and it is not neceſſary to ſhew the date, or to alledge the time or place of converſion. Poſt 535. 1. Roll. Ab. 5. Cro. Eliz. 78. 98. 219. 723. Cro. Jac. 638. 1. Roll. Rep. 1. 1. Co. 56. 4. Mod. 156. Hard. 111. 1. Salk. 219. 283. 6. Mod. 112. Buller's N. P. 37. 46. Gilb. Evid. 258. Strange, 60. 576. 813. 859. 1. Com. Dig. 219. 220. 4. Com. Dig. 28. 1. Will. 116.

ERROR of a judgment in the common pleas in an action of TROVER AND CONVERSION of a bond of one hundred pounds, conditioned for the payment of fifty pounds at ſuch a day, which came to the defendant's hands; and he being required ſuch a day and year to deliver it, had not delivered it, but refuſed, and converted it to his own uſe; but no *day*, *year*, or *place* of this converſion was mentioned.

The defendant pleaded not guilty; and found againſt him, and judgment for the plaintiff.

MASTER GRIMSTON aſſigned for error, FIRST, Becauſe no *date* of the bond is mentioned.—*Sed non allocatur:* for being loſt and converted, he peradventure did not know the certain date of the bond; and if he ſhould recite a date and miſ-recite it, it would be a failure of his ſuit.

SECONDLY, Becauſe he did not alledge the *day* nor *place* of the converſion (*a*).—*Sed non allocatur:* for the denying to deliver it upon requeſt is a converſion, and the *day*, *year*, and *place* are thereby alledged; which is ſufficient: and the allegation of the converſion (which hath no day nor place) is not material, when there was a ſufficient converſion before. Whereupon the judgment was affirmed.

(*a*) See 16. & 17. Car. 2. c. 8.

Case 9.

Kiffin *againſt* Vaughan and his Wife.

Trinity Term, 6. *Car.* 1. *Roll* 571.

Pleadings in a *quod ei deforceat.*

ERROR of a judgment at the grand ſeſſions in the county of *Montgomery* in a *quod ei deforceat*, in nature of *a writ of right*. The defendant ſaith, that he hath *majus jus* than the plaintiff; and iſſue thereupon: and at the day the defendant made default, and *petit cape* awarded; and at the day of the *petit cape* returned, *Edward ap Thomas* prayed to be received, becauſe the feoffment was made to the uſe of the ſaid *Vaughan* and his wife, for the life of the wife, the remainder to the ſaid *Edward ap Thomas* and his heirs. The demandant COUNTERPLEADS that receipt, traverſing the feoffment; and iſſue joined thereupon: and at the day of return of the jury *Edward ap Thomas* did not appear, but one *John ap Edwards*, as his ſon and heir, prayed to be received by his guardian, he being within age; and ſaid, that his father was dead, and he as ſon and heir appeared, and pleaded the ſame plea as his father pleaded, and prays *que le parol demurrer pur ſon nonage*. The plaintiff COUNTERPLEADS his receipt, taking iſſue upon the feoffment *ut antea*; and upon that they were at iſſue; and at the day the tenant by receipt made default, and a *petit cape* awarded, and at the day he did not ſave his default; whereupon judgment was againſt the tenant by receipt; and error brought.

THE FIRST ERROR aſſigned was, Becauſe THE COUNTERPLEA was of *the feoffment* alledged, where he ought to have ſaid of *the reverſion*; and he cannot traverſe the feoffment, but *quocunque modo* the

the reverſion: and although he hath it not by feoffment, yet if he hath it by any other way, that ſufficeth. KIFFIN *againſt* VAUGHAN and his WIFE.

THE SECOND ERROR was, Becauſe the receipt is admitted after receipt, which ought not to be, unleſs in caſe where the tenant by receipt dies, and his heir comes *in loco ſuo.*

THE THIRD ERROR was, Becauſe the judgment was given upon the default of the tenant by receipt againſt the tenant by receipt, where the judgment ought to be always againſt the tenant to the action. Cro. Jac. 688.

And this WAS HELD a manifeſt error. Whereupon the judgment was reverſed.

Abraham Jennings *againſt* Vandeputt and Others. CASE 10.

DEBT upon an arbitrament to deliver ſeventy-five pounds. And declares, That the plaintiff and defendants ſubmitted themſelves to the arbitrament of four merchants concerning certain accounts of pilchers, ſo as the arbitrament be made and delivered in writing before the twentieth of *July* following; and if they could not agree, then to the arbitrament of ſuch an umpire as the arbitrators ſhould name, ſo as he made his umpirage in writing before the five-and-twentieth of *July* following: and ſhews, that the four arbitrators did not make any arbitrament *ad vel ante* the twentieth of *July* following; but that before the twentieth of *July*, *viz.* the eighteenth of *July*, three of them, and the fourth arbitrator agreeing thereunto, upon the one-and-twentieth of *July*, by their writing dated the eighteenth of *July*, nominated *Abraham Chamberlaine* for umpire, who took the charge upon him, and before the twenty-fifth of *July* made an award *ſuper præmiſſis*, VIZ. that the defendants ſhould pay the ſaid ſeventy-five pounds within a month, &c.; and for non-payment this action was brought; and upon *nil debet* it was found for the plaintiff.

On a ſubmiſſion to arbitration, ſo as the arbitrators make their award on the 20th July, or chuſe an umpire before the 25th July, the appointment of an umpire before the 20th July is *void*, if the arbitrators make an award before their time expires; but good if they make no award at all.

1. Roll. Ab. 262. 2. Saun. 133. 1. Mod. 274. 1. Lutw. 544. 1. Salk. 71. 2. Vent. 116. 1. Com. Dig. 391. 2. Mod. 169. Ld. Ray. 222. 671. 12. Mod. 120. 512. Kyd's Awards, 51. 3. Term Rep. 592.

GRIMSTON moved in arreſt of judgment, that this nomination of the umpire before the twentieth of *July* (at which time they were to make their award) was not good; for they had all that time to make their award, and no time then appointed for to nominate an umpire, until after the twentieth of *July*.

Sed non allocatur: for there is no complete nomination until the agreement of the fourth arbitrator with the other three, *viz.* the one-and-twentieth of *July*; and the writing is not to have effect until that time: and it is no writing by intendment until ſealed, although it be dated before; and if they had nominated the umpire before the time expired of making their arbitrament, yet it is good enough, when no arbitrament is made by them within the time. Whereupon it was adjudged for the plaintiff.

Case 11.

Watts *againſt* Baker.

Tender of amends under the 21. *Jac.* 1. c. 12. muſt be immediately after the treſpaſs committed, and before *an arreſt* upon a *latitat*.

1. Roll. 538. 2. Black. 853. 5. Bac. Ab. 7. 2. Burr. 953. 956. 963. 1. P. C. 63.

TRESPASS *quare clauſum fregit*. The defendant pleads according to the 21. *Jac.* 1. c. 12. (*a*), that he tendered amends before the action brought, *viz.* the ſecond of *October ſeptimo Caroli*. The plaintiff replies, that before ſuch tender he ſued a *latitat*, teſted the laſt day of *Trinity Term* before, and upon that procured the defendant to be arreſted, intending to declare in treſpaſs. It was thereupon demurred:—AND RESOLVED, that this tender came too late; for as well as a tender after an original writ comes too late, ſo after an arreſt upon a *latitat*; for the tender by the ſtatute is intended to be immediately after the treſpaſs, and before any ſuit commenced. Wherefore it was adjudged for the plaintiff.

1. Bl. Rep. 208. 217. 1. Wilſ. 141. Tidd's Practice, 189. 5. Com. Dig. 364. 2. Hawk. Dougl. 62.

(*a*) See 24. Geo. 2. c. 44. ſ. 4. & 5.

Case 12.

Anonymous.

By cuſtom, fiſh taken in the ſea is tithable where they are landed. Poſt. 339.

1. Roll. Ab. 636. 656. Noy, 108. Herl. 13. Palm. 527. Bunb. 43. 256. 3. Com. Dig. 101. 3. Term Rep. 385.

A PROHIBITION was prayed by CALTHROP to ſtay a ſuit upon an appeal here to the delegates from a ſentence in *Ireland* (*a*) for tithes of fiſh taken in the ſea, Becauſe fiſh in the ſea or great rivers are *feræ naturæ*, and not tithable.

SECONDLY, Becauſe the ſea is not within any pariſh; ſo as no ſpiritual perſon can ſay it is within his pariſh where the fiſh is taken.

But the prohibition was denied; for tithes of fiſhes are uſually paid in *Ireland*, as JONES, *Juſtice*, affirmed. And it was ſaid in *Cornwall*, they pay tithes for fiſhing in the ſea to the parſon of the pariſh where they are landed; and it is a cuſtom in *Yarmouth*, that tithes ſhall be paid for herrings.

(*a*) See the ſtatutes 22. Geo. 3. c. 53. and 23. Geo. 3. c. 28. by which this appeal is now aboliſhed. Poſt. 512.

Case 13.

Hopeſtill Tyndal's Caſe.

Ante, *Page* 252.

A *pluries certiorari* directed to the mayor and jurats of one of the *Cinque Ports* to remove an indictment of felony. See S. C. ante, 252. Poſt. 291.

1. Roll. Ab. 395. Cro. Jac. 543. 2. Hawk. P. C. 400. Dougl. 749. 751. 3 Term Rep. 638.

A CERTIORARI being awarded to the mayor and jurats of *Hithe* to remove an indictment taken there againſt *Hopeſtill Tyndal*, who was indicted before them for buggery; they returned upon the writ, that it is one of the *Cinque Ports*, and that they have a privilege there, and of time whereof, &c. that no writ out of the king's courts runs there, but it muſt be directed to "The Warden of the *Cinque Ports*," who ſhould ſend them, and then they were returned, and not otherwiſe.

It was moved, that this is an ill return, and that they had not any ſuch liberty; for they may not meddle with matters of the crown, becauſe it is ſaved in MAGNA CHARTA. Whereupon it was prayed, that it might be diſallowed, and that a *pluries certiorari* might be awarded againſt them, commanding them to certify the indictment

indictment at ſuch a day, and then to be in perſon to ſhew their charters and evidence for their pretended claims, and to anſwer their contempt in not returning the record upon the firſt writ. HOPESTILL TYNDAL'S CASE.

NOY, *the King's Attorney*, ſhewed a record in *Eaſter Term* 43. *Edw.* 3. *Roll* 19. out of the treaſury of the exchequer, *viz.* A writ being awarded out of the chancery to the mayor and commonalty of *London*, to certify an indictment there taken againſt one *Lumbard* for engroſſing of ſilk, upon the *alias* they made ſuch return, that by ancient charters, confirmed by parliament and ancient uſage, they had ſuch a privilege, that all indictments and proceedings for any cauſe unleſs for felony ſhould be tried and determined there, and not elſewhere; and hereupon a *pluries* was awarded to return this indictment into chancery, and that they ſhould be there at the ſame day to ſhew their evidence and charters to maintain their claim, and to anſwer their contempt; and at the ſame day they returned all their evidence and proceedings there (*a*); and ſo it was prayed that ſuch courſe ſhould be obſerved here.

(*a*) 1. Keb. 352. 571. Raym. 74. 3. Mod. 230. Hard. 402. 419. 1. Sid. 155. 230. 1. Burr. 386. 1. Bl. Rep. 230. 2. Hawk. P. C. ch. 25. ſ. 97.

And THE COURT awarded accordingly a *pluries certiorari*, directed to the mayor and jurats.

(*a*) See 5. Will. & Mary, c. 11. ſ. 2.

Goodyear *againſt* Biſhop. CASE 14.

ACTION FOR WORDS. Whereas the plaintiff is, and for divers years hath been, a merchant, and uſed the trade of a merchant; that the defendant, having communication with one *Harris* of the plaintiff, to ſcandalize him and deprive him of his means of living, ſaid of the plaintiff theſe ſcandalous words: "He "(*innuendo* the plaintiff) is not worth a groat, he is a hundred "pounds worſe than nought."

To ſay of a merchant that he is 100l. worſe than *nothing* is tantamount to calling him a *bankrupt*.

After verdict for the plaintiff in *London*, and one hundred marks damages given, it was moved in arreſt of judgment, that theſe words are not actionable, for he doth not ſhew that he ſpake of him as in relation to his profeſſion, nor called him bankrupt.

But ALL THE COURT held, that theſe words of a merchant who lives upon his credit, which is the principal means of his gains, are very ſcandalous, and *tantamount* as if he had called him bankrupt. Wherefore it was adjudged for the plaintiff.

Johnſon *againſt* Sir Henry Rowe. CASE 15.

PROHIBITION; for that THE PRIOR of the Salutation of the order of THE CARTHUSIANS was ſeiſed in fee of a houſe and grange called *Bloomſbury*, in the pariſh of *St. Giles*, and of ſuch lands in the tenure of the plaintiff; and that he and all his predeceſſors, until the day of the diſſolution, held them diſ-

In prohibition on a diſcharge from tithes, if the defendant plead an agreement with the abbot, that the diſcharge

diſcharge ſhould not extend to the lands when in the occupation of leſſees, and *traverſes* without ſhewing title in the abbot, the *inducement* is bad. Poſt. 336. 442.—Hob. 321. Cro. Eliz. 671. Cro. Jac. 86. Jones, 328.

JOHNSON *againſt* SIR HENRY ROWE.

charged of tithes; and ſo ſeiſed, the 29. *Hen.* 8. ſurrendered them to the king; and pleads the ſtatute of 31. *Hen.* 8. c. . and conveys the intereſt from the king to the plaintiff, &c.

The defendant pleads, that, 1ſt *May* 1422, it was agreed betwixt the maſter of the hoſpital of *Burton Lazars* and the ſaid prior, that when the lands of the manor of *Bloomſbury* were in the hands of the tenants or ſervors of the prior that tithes ſhould be paid; and when the lands ſhould be in the hands of the prior himſelf, that they ſhould not pay tithes, but then they ſhould have ſix kine-gate, in ſuch a paſture of, &c. in lieu of the tithes; and conveys the poſſeſſion of the hoſpital to the king by ſurrender, and from the king to the defendant; and TRAVERSETH, that the plaintiff now holds the lands diſcharged of tithes, &c.

The plaintiff thereupon demurs.

And IT WAS ADJUDGED for him, that the plea is ill, and no good inducement to the traverſe; for he makes no title to the maſter of the hoſpital for tithes, but only pretends an agreement, but doth not entitle him to the tithes, nor ſhews that he was ſeiſed of them in fee, nor doth ſhew any thing for which they might make ſuch an agreement: alſo, he doth not ſhew the agreement to be by writing; and the inducement of a traverſe ought to be always ſufficient. Whereupon it was adjudged for the plaintiff.

CASE 18.

The King *againſt* Warde and Lyme.

An ancient highway cannot be changed without *the king's licence* firſt obtained on an *ad quod damnum*, although an inquiſition find that it is no damage to the king to grant a licence.

Vaughan, 341. Yelv. 141. 1. Burr. 465. 2. Com. Dig. 397. 1. Hawk. P. C. 367.

INFORMATION. Whereas there was from the time whereof, &c. a common highway in *Cold-Aſhby*, in a lane called *Crick-lane*, leading to divers market-towns, as well for horſemen as for footmen and for carriages; that the defendants, on the firſt of *June*, 7. *Car.* 1. with hedges and ditches erected croſs the lane, incloſed and ſtopped the ſaid way, and held it incloſed and ſtopped, whereby, &c.

The defendants confeſs, that there was ſuch a common highway *prout* in the information, and that they incloſed and ſtopped it; but they ſay, that the ſaid way was ſo foul, and ſurrounded with water and dirt, that paſſengers could not paſs there without great danger: and that before the ſtopping of the lane, *viz.* on the 30th *May*, 7. *Car.* 1. for the profit and eaſe of the paſſengers, one *Carew Sands*, being ſeiſed in fee of a cloſe adjoining to the ſaid lane, laid out another way more commodious for the king's people there to paſs; and before the laying out of that way, *viz.* 18th *May*, 7. *Car.* 1. A WRIT OF AD QUOD DAMNUM iſſued to enquire, Whether it were to the damage, &c. if the king ſhould grant ſuch licence to the defendants to ſtop the ſaid way? And thereupon an inquiſition was taken, 31ſt *May*, 7. *Car.* 1. that it was not to the damage, &c. if the king ſhould grant ſuch licence, &c. for that another way is laid out as beneficial for the people; *abſque hoc*, that they incloſed and ſtopped it with hedges, &c. *ad commune nocumentum*, &c.

THE

THE KING *against* WARDE and LYME.

THE ATTORNEY GENERAL upon this demurred.

It was now moved, that this plea was ill in matter and form, becauſe the allegation that *Carew Sands* laid out another way more beneficial for the king's people, not appearing by what authority he did it, is not good; for it is but at his pleaſure, and he may ſtop it when he will; and by the laying out the ſubjects have not ſuch an intereſt therein as that they may juſtify their going there; nor is it any ſuch way that the inhabitants are bound to watch there, or to make amends if any robbery be there committed, nor is any perſon liable to repair and maintain it: alſo the pleading the iſſuing of the *ad quod damnum*, and the inquiſition thereupon, is to no purpoſe when he doth not plead that he obtained licence, for that is only on purpoſe to enable him to obtain licence (*a*); and therefore the plea is ill. *Vide Regiſter*, 253. & 255.

ANOTHER EXCEPTION was taken, Becauſe the traverſe is ill, that he did not incloſe *ad nocumentum*, &c.

THE COURT therefore for theſe reaſons held the plea ill, and gave rule for judgment.

(*a*) *Vide* 13. Geo. 3. c. 78. ſ. 18.

Michaelmas Term,

8. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Berkley and *Crawley* promoted on the deaths of *Whitlock* and *Harvey*, Juſtices.

Memorandum.

IN the vacation SIR JAMES WHITLOCK, one of the Juſtices of the king's bench, died in his houſe at *Fauly* in the county of *Bucks*, and SIR FRANCIS HARVEY, one of the Juſtices of the common pleas, died at his houſe in *Northampton*; and SIR ROBERT BERKLEY, the *King's Serjeant*, of the *Middle Temple*, was made and ſworn Juſtice of the king's bench the eighteenth of *October*, and FRANCIS CRAWLEY, the *Queen's Serjeant*, was made and ſworn Juſtice of the common pleas the ſame day.

CASE 2.

"He was arraigned for ſtealing hogs" are actionable words.

S.C. Jones, 299. 2. Roll Abr. 64. 4. Co. 16. Cro. Eliz. 279. Cro. Jac. 154. Hob. 177, 219. 2. Wilſ. 300.

Halley *againſt* Stanton.

Trinity Term, 8. *Car.* 1. *Roll* 1405.

ACTION FOR WORDS. Whereas he had been always of good converſation, and never touched with any ſuſpicion of any matter of felony, and uſed the trade of buying and ſelling of cattle, and thereby gained his living; that the defendant maliciouſly ſpake theſe words of the plaintiff, "He" (*innuendo* the plaintiff) "was arraigned at *Warwick* for ſtealing of twelve hogs, "and if he had not made good friends it had gone hard with him;" *ubi revera* he never was arraigned nor queſtioned for any felony.

After verdict upon not guilty pleaded, it was found for the plaintiff, and damages twenty pounds.

CREW, *Serjeant*, now moved in arreſt of judgment, that theſe words are not actionable; for to ſay, "he was arraigned for ſe-"lony," is not any cauſe of action, no more than to ſay, that "one was detected for felony;" for good and honeſt men may be ſuſpected or arraigned for felony; and in the Caſe of NOELL, *an attorney* (*a*), "You were cooped up for forging of writs," it was adjudged the action lies not.

But ALL THE COURT *ſeriatim* delivered their opinions, that the action lies; eſpecially as in this Caſe it is alledged, that he falſely and maliciouſly ſpake theſe words, adding, "if he had not made "good friends it had gone hard with him," which ſhews that he conceived he was guilty of ſuch an offence; and when it is merely falſe, as it appears by averment that he never was arraigned for any felony, nor ever committed any, it is the more malicious; and being ſpoken in diſgrace that none ſhould truſt him, it therefore differs from the Caſe cited, and from the Caſe of *Bayly v. Churrington* (*b*), where an action was brought for ſaying theſe

(*a*) 31. Eliz. (*b*) Cro. Eliz. 279. in C. B.

words,

words, "Thou wert *arraigned* for two bullocks;" and, after verdict upon not guilty found for the plaintiff, it was adjudged, that the action lies not, becauſe he doth not ſay, "for *ſtealing* of bul-"locks," nor that any felony was committed, nor avers that he never was arraigned for felony as here. The caſe of *Hayns v. Spratt* (*a*) was alſo cited, for ſaying, "Thou wert in *Norwich* "gaol for a robbery committed upon *James Steward*," with an averment that he never was in any gaol for felony, and it was adjudged that the action lay. Whereupon it was here adjudged for the plaintiff.

HALLEY *againſt* STANTON.

(*a*) Cro. Jac. 247. See Hob. 177.

Southold *againſt* Daunſton.

CASE 3.

Trinity Term, 8. *Car.* 1. *Roll* 868.

ACTION FOR WORDS. Whereas he was of good name and fame, and was in communication to be married to ſuch a woman, with whom he ſhould have had ſuch a portion; that the defendant, to ſcandalize him, and to hinder and deprive him of his marriage, ſpake theſe words of the plaintiff, "*Southold* hath been "in bed with *Dorcheſter*'s wife," whereby he loſt his marriage. After verdict upon not guilty pleaded, and found for the plaintiff,

To accuſe another of adultery *per quod* he loſt his marriage, is actionable. Ante, 155. Poſt. 322. 1. Roll. Abr. 35. Cro. Jac. 323. 1. Com. Dig. 185. Bull. N. P. 6. 2. Term Rep. 474.

BING, *Serjeant*, moved, that theſe words are not actionable; for it may be, he was in bed with her when he was a child, ſhe being his nurſe, or it may be that her huſband was in bed betwixt them; and words ſhall be taken *in mitiori ſenſu* when any conſtruction can be made to help it.

But JONES and MYSELF conceived, that being ſpoken to diſgrace him and deprive him of his marriage, and he ſhewing that he was deprived of his marriage, he hath good cauſe of action, and ſuch foreign intendments as have been alledged ſhall not be taken, but it ſhall be adjudged *ex effectu dicendi*, which is here to hinder him of his marriage, as it is now found by the verdict; but they would adviſe thereof.—And it was afterwards adjudged for the plaintiff.

Favely *againſt* Eaſton.

CASE 4.

Hilary Term, 6. *Car.* 1. *Roll* 1075.

EJECTMENT of a meſſuage and two hundred acres of land, fifty acres of meadow, and twenty acres of wood in *Biſhops Morchard*. Upon not guilty pleaded, and a ſpecial verdict, it appeared, that *John Eaſton*, tenant in tail to him and the heirs males of his body, of this meſſuage and land called *Eaſton's*, lying in *Biſhops Morchard*, levied a fine thereof by the name of a meſſuage and two hundred acres of land, fifty acres, &c. in *Eſſington*, *Eaſton*, and *Chilford*, to the uſe of him and his heirs; and they find, that there is not any vill or hamlet or place known by the name of the meſſuage or tenement called *Eaſton's*, out of the vills or hamlets, and that none of the ſaid tenements either be or were in *Eſſington* or in *Chilford*.

A fine levied of land called *Eaſton's* lying in *Morchard*, by the name of ſo many acres of land lying in *Eſſington Eaſton*, and *Chilford*, is good, although there is not any land known by the name of *Eaſton's*, nor any ſo called in *Morchard* or in *Eſſington*, or in *Chilford*. 1. Mod. 206.

The queſtion was, Whether, upon this matter found, a fine levied of lands in places known in a vill, not mentioning the vill or hamlet where the lands are, be good?

Poſt. 276.—Jones, 304 Godb. 440. Cro. Jac 574. 1. And. 245. 1. Vent. 143 176. 3 Com. Dig. 346. 2. Bac. Abr. 544, 545. Cruiſe, 125. Comp 72.

GRIMSTON

PAVELY *againſt* EASTON.

GRIMSTON argued, that it is not good; for a fine ought to be of lands in a vill or hamlet, naming the vill or hamlet wherein they lie, or the places known out of every vill or hamlet, but not of land in places known in a vill; as here, a place known without mentioning the vill.

But CALTHROP, *for the plaintiff*, argued, that the fine is good, becauſe it is a perſonal action; and although the covenant be real in reſpect it concerns land, yet the action is perſonal; and as perſonal actions may be brought of land in places known, by the ſame reaſon fines may be levied. *Vide* 1. *Hen.* 5. *pl.* 9. *per* HALES, 21. *Edw.* 3. *pl.* 14. 38. *Edw.* 3. *pl.* 20. 29. *Edw.* 3. *pl.* 10. 7. *Edw.* 6. "*Fines.*" BROOK, 9. *pl.* 44. FOR A SECOND REASON, a fine is but an aſſurance by agreement betwixt the parties, which may be by ſuch names as the parties agree; and he cited for that a caſe in this court, of *Munck v. Butler* (*a*).

And RICHARDSON and JONES were of this opinion, and MYSELF agreed with them; for a fine, being but an aſſurance, is favourably to be taken: as a recovery of an advowſon or penſion, though it be not proper, yet being ſuffered, hath been adjudged good, becauſe it is but a common aſſurance, although not allowable in other actions, as in *Dormer's Caſe* (*b*) is reſolved; ſo this fine, being levied and recorded, is good enough.

Cro. Jac. 393.

But THE COURT would adviſe further thereof (*c*).

(*c*) It was moved again, and adjudged for the plaintiff, poſt. 276.

(*a*) Cro. Jac. 574. (*b*) 5. Co. 40.

CASE 5.

Cawdry *againſt* Highley, alias Tythay.

An action lies for ſaying of a doctor of phyſic that "*he is no* "*ſcholar*," without averring that there was at the time a *colloquium* concerning his profeſſion. Poſt. 382.

Godb. 441. 1. Roll. Abr. 54. Cro. Eliz. 620. Winch, 40. Hetley, 69. 175. 2. Mod. 19. 11. Mod. 221. Ld. Ray. 1480.

ACTION FOR WORDS. Whereas the plaintiff was of good converſation, and exerciſed in the practice of phyſic as well in *London* as in the county of *Lincoln* and other places, and by reaſon of his knowledge in the ſaid art was, about twenty years ſince, made doctor of phyſic in *Cambridge* according to the courſe of the univerſity, and practiſed and miniſtered phyſic to divers noblemen and others for twenty-one years laſt paſt; that the defendant, *præmiſſorum non ignarus*, out of malice, to ſcandalize him with his patients, and to withdraw them from meddling with him, ſaid *of* the plaintiff, and *to* the plaintiff, in the preſence and hearing of divers, "Thou art a drunken fool and an aſs; thou wert never a "ſcholar, and art not worthy to ſpeak to a ſcholar, and that I will "prove and juſtify." After not guilty pleaded, and found for the plaintiff,

HUTTON moved, that the action lies not: for he doth not ſhew there was communication with any concerning his ſkill in phyſic, or his practice therein; and the firſt words, "Thou art a fool and "an aſs," are but words of ſcorn, and the other words touch him only in ſcholarſhip, and not in his art, and a phyſician may be no good ſcholar, and yet a good phyſician. And it was compared to *Buckley's Caſe*, for ſaying of an attorney, that "he is a corrupt "man;" unleſs there be conference of his profeſſion the action lies not.

RICHARDSON, *Chief Juſtice*, ſaid he was of that opinion, but he would adviſe.—Afterwards, in *Trinity Term*, 9. *Car.* 1. it was adjudged for the plaintiff.

Manning

Manning and his Wife *againſt* Fitſherbert.

Case 6.

ACTION UPON THE CASE; for that the defendant *ex malitiâ* upon the plaintiff's wife *crimen felonіæ impoſuit*, and had cauſed her to be brought before *Mr. Gregory*, a juſtice of peace of the county of *Oxon*, *et falsò et malitioſè* ſaid before him *ad tunc et ibidem*, "that he charged her with felony for ſtealing of an hog "from one *Hundby* his couſin," and required that ſhe might be bound over to the aſſizes, whereupon ſhe was inforced to find ſureties for her appearance at the aſſizes. After verdict upon not guilty pleaded, it was found for the plaintiff, and forty ſhillings damages aſſeſſed.

In an action for malicious proſecution, the word "*malicious*" implies that the charge was "*falſe*," and the *day and place* where it was made ſhall be intended the ſame to which *ad tunc et ibidem* relate. Poſt. 276. 525.

LITTLETON, *Recorder of London*, moved in arreſt of judgment, that the action lies not: FIRST, Becauſe they do not ſay, that the defendant *falsò* impoſed upon her the crime of felony. SECONDLY, For that they do not ſhew the day and the place when and whither he cauſed her to be brought. THIRDLY, Becauſe they join actions for words and in nature of a conſpiracy together.

Dyer 28. in marg. Keilw. 100. Cro. Jac. 362. 2. Hawk. P. C. 163. Dougl. 215. 1. Term Rep. 493. 2. Term Rep. 225. 4. Term Rep. 247.

Sed non allocantur: for when they ſay, that the defendant "*ex* "*malitiâ*" impoſed *crimen felonіæ*, that implies "*falsò*;" and when it is ſaid, he cauſed her to be brought before a juſtice of the peace, that is coupled with the other, and ſhall be intended the ſame time and place, eſpecially when it is afterwards that he *ad tunc et ibidem* charged her with felony. And for the other matter, it is not in nature of a conſpiracy, but an aggravation of the falſe and malicious accuſation. Whereupon it was adjudged for the plaintiffs.

Chapman *againſt* Allen.

Hilary Term, 7. *Car.* 1. *Roll* 419.

Case 7.

ACTION OF TROVER of five kine. Upon not guilty pleaded, a ſpecial verdict was found, that one *Belgrave* was poſſeſſed of thoſe five kine, and put them to paſturage with the defendant, and agreed to pay to him twelve pence for every cow weekly as long as they remained with him at paſture; and that afterwards *Belgrave* ſold them to the plaintiff, and he required them of the defendant, who refuſed to deliver them to the plaintiff, unleſs he would pay for the paſturage of them for the time that they had been with him, which amounted to ten pounds: afterwards one *Foſter* paying him the ſaid ten pounds by the appointment of *Belgrave*, he delivered the five beaſts to *Foſter*: and if *ſuper totam materiam* he be guilty, they find for the plaintiff, and damages twenty-five pounds; and if, &c. then for the defendant.

If a man take in cattle to depaſture on *a contract* at ſo much a head *per* week, he cannot detain them againſt the vendee of the owner for the value of the *agiſtment*, unleſs there is a ſpecial agreement to that effect.

JONES, *Juſtice*, and MYSELF *(abſentibus cæteris Juſticiariorum)*, conceived, that this denial upon demand, and delivery of them to *Foſter*, was a converſion, and that he may not detain the cattle againſt him who bought them until the ten pounds be paid, but is inforced to have his action againſt him who put them to paſturage. And it is not like to the caſes of an innkeeper or taylor;

Hob. 42. Yelv. 67. 178. Moor, 877. 1. Vent. 268. 12. Mod. 482. Cro. Eliz. 622. Finch Law, 180. Bull. N. P. 45.

3. Burr. 1500. 2. Bl. Com. 452. 1. Bac. Abr. 240. Salk. 388. Sayer, 224.

they

CHAPMAN *againſt* ALLEN.

they may retain the horſe or garment delivered them until they be ſatisfied (*a*); but not when one receives horſes or kine or other cattle to paſturage, paying for them a weekly ſum; unleſs there be ſuch an agreement betwixt them. Whereupon rule was given, that judgment ſhould be entered for the plaintiff.

(*a*) 1. Com. Dig. 211.

CASE 8.

Johns *againſt* Staynar.

Hilary Term, 8. *Car.* 1. *Roll* 343.

In ejectment, if the *teſte* be alledged after the *teſte* of the original, the judgment is erroneous. Ante, 90. Poſt. 282. 575.

ERROR of a judgment in ejectment, Becauſe the original writ doth not warrant the declaration, for the original bears date 24. *January*, 6. *Car.* 1. and the ejectment is ſuppoſed 31. *January*.

After verdict upon not guilty pleaded, and found for the plaintiff, and judgment entered, this error was aſſigned; and upon *diminution* alledged the writ was certified, and the defendant pleaded *in nullo eſt erratum*.

S.C. Jones, 304. Yelv. 70. Cro. Jac. 70. 561. 1. Leon. 186. 204. 3. Leon. 51. 1. Sid. 307, 308. Hob. 198. Carth. 114. 2. Lev. 141. Cro. Eliz. 325. 2. Show. 147. 1. Wilſ. 171. 1. Bac. Abr. 92. Stra. 877.

ROLLE now moved, that it is good notwithſtanding; for the writ was returnable *Craſtino Purificationis*, and the trial was upon the iſſue joined *Trin. Septimo Caroli*, and there doth not appear any continuance upon this; wherefore it ſhall be intended, that another original writ was brought, which is wanting and not certified; and compared it to the Caſe of *The Biſhop of Worceſter*, where the declaration was of a leaſe by himſelf in an ejectment, and the writ certified was of a leaſe by his predeceſſor, and holden, that it ſhould not be intended the original, whereupon the action was brought. Alſo, where an action is brought and tried in *Middleſex*, and the original certified in *London*, it ſhall be intended not to be the ſame original, but rather that it was a verdict without an original, which is aided by the ſtatute where there is no original (*a*).

1. Com. Dig. 106. 320.

(*a*) It was moved again in Michaelmas Term, and the Judgment reverſed. Poſt. 283.

CASE 9.

Harris *againſt* Richards.

Trinity Term, 7. *Car.* 1. *Roll*

Aſſumpſit.

ASSUMPSIT. Whereas one *Bond* was bound to the plaintiff in an obligation of forty pounds for the payment of twenty pounds; and whereas the defendant was bound to one *Hodges* in an obligation of one hundred pounds, dated 5. *February*, 19. *Jac.* 1. for the payment of fifty-five pounds the fifth of *February* following; and the ſaid twenty pounds and fifty-five pounds being due and not paid, that the defendant, the firſt of *February* 1624, which was in the twenty-ſecond year of *James* the firſt, in conſideration the plaintiff would forbear the payment of the twenty pounds until 1627, and in conſideration the plaintiff would compound with the ſaid *Hodges* for the ſaid fifty pounds, and the intereſt then due, and deliver the ſaid bonds into his hands, aſſumed to pay to him the ſaid twenty pounds and the ſaid fifty pounds, and all the intereſt, which he ſhould pay or compound for; and alledges in fact, that he did forbear the ſaid twenty pounds, and upon the firſt of *March* 1624

paid

paid the said fifty pounds, and fifteen pounds for interest, and obtained the said bond into his hands; and that upon such a day, year, and place, he gave notice thereof to the defendant, and required of him payment thereof according to his promise, who had not paid it; and therefore he brought this action. HARRIS *against* RICHARDS.

After verdict for the plaintiff, GERMYN and CALTHROP moved in arrest of judgment, that this action lies not; for it is no lawful consideration to pay interest.—*Sed non allocatur:* for it is to compound a forfeited bond; which is a good consideration: also, it is no unlawful consideration to pay interest, not being more than is permitted. The taking of reasonable *interest* for the use of money was permitted by the common law. Cro. Jac. 379. P. C. 528.

1. Com. Dig. 148. 1. Hawk.

The SECOND EXCEPTION was, That there was not any consideration why the defendant should pay the twenty pounds, for he had not any benefit thereby.—*Sed non allocatur:* for it is a sufficient consideration that the plaintiff at his request would forbear it. A promise to pay money in consideration of the forbearance of a debt will

maintain an action. Ante, 70. 77. 242. Post. 409.—1. Roll. Ab. 25. 2. Roll. Ab. 782.

THE THIRD EXCEPTION, That it is not alledged he gave notice what he paid for the composition, nor the place nor time.—*Sed non allocatur*; for upon the view of the record it appeared, that the said day and place of the notice were set down.—And JONES conceived, if there had not been such a precise notice of the quantity he paid, and when, yet being expressly alledged that he paid so much, and required it, and that it was not paid upon request, it had been sufficient.—Wherefore it was adjudged for the plaintiff. And error being afterward brought, the judgment was affirmed. Notice.

Burgaine *against* Spurling. CASE 10.

Trinity Term, 7. Car. 1. Roll 373.

EJECTMENT. Upon a special verdict the case was, *Thomas Jackson*, a copyholder, 20th *April*, 6. *Car.* 1. surrendered a copyhold messuage and twenty acres of land, parcel of the manor of *Hurst*, into the hands of two tenants of the manor, to the use of *Hutchinson* and his heirs, upon condition, that if he paid the said *Hutchinson* 1060*l.* upon the first of *July* following, that the surrender should be void. And they find the custom of the manor to be, that the copyholder may surrender his copyhold into the hands of two tenants of the manor; and that the 25th of *May*, *sexto Caroli*, before the payment of the said money, he surrendered an acre, parcel of the twenty acres, into the hands of two tenants of the manor, to the use of *William Jackson* and his heirs, and afterwards the surrenderor paid the said 1060*l.* according to the condition, and then surrendered the said tenements into the hands of the steward of the manor, to the use of *Richard Price* and his heirs; and afterwards, the 8th of *October*, *sexto Caroli*, being the first court after these surrenders made, the two last surrenders were presented, and the said *William Jackson* was admitted to the said one acre surrendered to the use of him; and the said *Richard Price* was admitted at the same court to the said messuage and twenty acres, whereof the said one acre was parcel, according to the surrender made to the use of him; and that the said surrender to the use of If a copyholder surrender his estate to the use of *A* upon condition that if he pay the said *A.* such a sum of money at a particular time, the surrender shall be void; and before performance of this condition he makes another surrender to *B.* and after condition performed makes another surrender to *C.* which two last surrenders are presented; the first surrender not having been presented at the next court is

void, and therefore the second surrender good. Post. 283.—1. Roll. Abr. 500. Co. Lit. 60. note (2). 2. Wilf. 13. 1. Com. Dig. 542. 2. Com. Dig. 499. 1. Bac. Ab. 463. 1. Ter. Rep. 600. 2. Ter. Rep. 384.

Hutchinson

BURGAINE *against* SPURLING.

Hutchinſon was never preſented; and that there is a cuſtom within the manor, that if any ſurrender be made out of court to the uſe of another, and be not preſented at the next court, it is merely void; and that the ſaid *Richard Price* entered into the ſaid one acre and made a leaſe to the plaintiff; and the defendant, by command of the ſaid *William Jackſon*, ouſted him.

Gilb. Ten. 251, 252. 289.

The ſole queſtion was, Whether this ſurrender of the acre before the condition performed be good or not?

GRIMSTON argued *for the plaintiff*, that the ſurrender before he hath performed the condition is merely void, for all the intereſt is out of him, and then he hath not any power to make a ſurrender; but he agreed, that after the condition is performed the eſtate is reveſted in him, and he may make a ſurrender.

CALTHROP, *for the defendant*, argued, that this ſurrender upon condition, the condition being performed before the next court, and the ſurrender not preſented, the ſurrender is as if it never had been made; and after ſuch ſurrender, and before the condition performed, the copyholder remains ſtill intereſted, 4. *Co.* 28. and the eſtate was never out of him; ſo his ſurrender to another, he being admitted, is good.

(*a*) It was moved again this Term, and judgment given for the plaintiff.

JONES and MYSELF were of this opinion; but, *cæteris abſentibus*, *Adjournatur* (*a*). 3. *Levinz.* 385. See poſt. page 283, 284.

CASE 11.

Waller and Petty *againſt* Sands.

Trinity Term, 2. *Car* 1. *Roll* 374.

A reverſioner cannot ſell the timber-trees during the life of a tenant for life without impeachment of waſte. *Ante*, 242. 1. Roll. Rep. 182. Latch. 270. Allen, 82. 4. Co. 63. a. 11. Co. 84. Moor, 327. Co. Lit. 220. a. 2. Vern. 738. 5. Bac. Ab. 491. 3. Eq. Caſ. 759. 2. Atk. 283. 1. Com. Dig. 602. 1. Term Rep. 55.

TROVER AND CONVERSION of two hundred loads of timber and two hundred loads of ſtockwood. Upon not guilty pleaded, and a ſpecial verdict, the caſe was,

Tenant for life without impeachment of waſte, excepting voluntary waſte, he in the reverſion bargains and ſells the timber-trees growing upon the ſaid land to the plaintiff. The tenant for life cut down the trees, and ſells them to the defendant, and he ſells them to one *Green*.

The queſtion was, Whether the bargainee of the trees ſhall have an action of *trover* againſt the vendee of the tenant for life, the tenant for life cutting them and ſelling them being yet alive, as it was found by the verdict?

HYDE, *for the defendant*, argued, that he ſhall not; for during the life of the tenant for life, although the leſſor, or he in reverſion, hath a general property, yet he hath no authority to ſell them, the tenant for life having a particular intereſt and authority in them; and his ſale being void, his bargainee hath no intereſt to maintain the action. *Vide* 21. *Hen.* 6. *pl.* 46. *Dyer*, 90. 10. *Co. Lyford's Caſe*, 48. b. *Co. Lit.* 220. a. *Bowls' Caſe*, f. 82. a. *Et adjournatur.*

CASE 12.

Le Marchant *againſt* Rawſon.

Trinity Term, 7. *Car.* 1. *Roll* 732.

In debt on the 2. *Edw.* 6. c. 13. if the whole record be in "*debt*," and the *jurata* in the *niſi prius* record be "in *treſpaſs*," the *miſtake* may be amended after verdict. 1. Roll. Ab. 202. Hob. 246. Cro. Jac. 528. 3. Bac. Abr. 275.

DEBT upon the 2. *Edw.* 6. c. . for not ſetting forth of tithes. The defendant pleaded *nil debet*; and it was found againſt him.

GERMYN

GE-MYN moved in arreſt of judgment, that it was a miſ-trial, and without ſufficient warrant; for the *jurata* upon the *niſi prius* are, that "*jurat. ponitur in reſpectum inter* LE MERCHANT *plaintiff, et* "RAWSON *defendant, in placito tranſgreſſionis, uſque poſt Octab. Mich.* "*niſi prius, &c.*;" ſo by this *jurata*, which is the warrant of the juſtices of *niſi prius*, there is not any authority to try the iſſue; and it was held a plain miſpriſion. LE MARCHANT *againſt* RAWSON.

But the queſtion was, Whether after trial this be not amendable, for all the roll was well? The iſſue was in *debt*, and it was a mere miſpriſion of the clerk to make it in a plea of *treſpaſs*, where it ought to have been in a plea of *debt*: and the *jurata* is not the ſole warrant to the juſtices of *niſi prius* to proceed, for the writ of *diſtringas* is to try the iſſue "*in placito debiti, niſi prius, &c.*;" ſo that is a warrant to proceed, although the record of *niſi prius* doth not warrant it. And it hath been ruled, that where, upon ſuch writ of *diſtringas*, the ſheriff returns *nomina jurator. inter A. querent. et B. defendent. in placito tranſgreſſionis*, where the writ (to which the pannel is annexed) is *in placito debiti* (being but a miſpriſion of the ſheriff's clerk in miſ-reciting the writ) it ſhall be amended. Wherefore THE COURT would adviſe thereof (*a*). Cowp. 407. 429. Dougl. 116. 135. 1. Term Rep. 783.

(*a*) It was moved again, and the Poſt. 278.

Court were unanimouſly of opinion, that it might be amended.

Gryffyth *againſt* Biddle. CASE 13.

TRESPASS for taking a bullock and ſelling it. The defendant juſtifies, Becauſe at the ſheriff's tourn, held *infra menſem Paſch.* viz. 18th *April*, 6. *Car.* 1. the plaintiff was preſented for not appearing at the ſaid tourn, being *debito modo ſummonitus*, and amerced by the jury, which was aſſeered by four of the jury at forty ſhillings. At the next ſeſſions of the peace, viz. 22. *April*, it was certified and ratified by ſuch juſtices of peace; whereupon the ſteward made a warrant unto him to levy it, and ſo ſold, &c. Upon this plea it was demurred. Error in a juſtification to treſpaſs as bailiff to the ſteward of a *tourn*. 1. Roll. Ab. 525, 526. Jones, 300. 1. Bac. Ab. 100.

TROTMAN, *for the plaintiff*, took three exceptions. FIRST, Becauſe the defendant doth not alledge that the tourn was kept *infra menſem poſt feſtum Paſchæ*, but *infra menſem Paſchæ*, which may be as well before *Eaſter* as after; and by the 21. *Edw.* 3. c. 15. the tourn ought to be kept *infra menſem poſt feſtum Paſchæ, et poſt feſtum Sancti Michaelis*. So where the ſeſſions of the peace is appointed to be kept at one place, *et non alibi niſi propter peſtilentiam*, being kept in another place, it was held void. 7. *Hen.* 6. *pl.* 12. 28. *Hen.* 6. *pl.* 7. 8. *Hen* 7. *pl.* 4. *Dyer*, 137. How the keeping of a ſheriff's tourn ſhall be alledged in pleading. S. C. Jones, 300. 2. Inſt. 72. 1. Leon. 28. 74. Cro. Eliz. 125. 2. Saund. 290. Cro. Jac. 167. 1. Vent. 107. 8. P. C. 84.

THE SECOND EXCEPTION, Becauſe the amercement is alledged to be made by the jury, and aſſeered by four of the jurors, whereas it ought always to be aſſeſſed by the Court; for it is a judicial act, and ſhall be aſſeered by the aſſeerers appointed. *Old Entries*, 507. *New Entries*, 119. An amercement in a *tourn* muſt be by the Court, and not the jury. 8. Co. 39. 1. Jones, 301. Strange, 847. 2. Hawk. P. C. c. 19. ſ. 18. 4 Com. Dig. 176. Fitzg. 109. 1. Bar. K. B. 214. See R. v. Ritſon, 2. Term Rep. B. R. p. 186. and caſes in note (*b*).

THE THIRD EXCEPTION, That the amercement was levied by the defendant, as bailiff, by warrant from the ſteward of the court; whereas by the 1. *Edw.* 4. c. 2. it is expreſsly appointed, that Amercements in the ſheriff's *tourn* muſt be levied by proceſs from the *ſheriff*. Jones, 301.

no

GRYFFYTH *againſt* BIDDLE.

1. Jones, 301. 2. Hale, 70. 142. Stawnf. 87. 4. *Edw.* 4. pl. 31. Fitz. Torn, 3. 2. Hawk. P. C. 93. 111.

no fine or amercement in the tourn ſhall be levied, unleſs it be certified at the next ſeſſions of the peace by indenture, and inrolled there, and by proceſs made from the juſtice of the peace of the ſeſſions to the ſheriff; and none of theſe circumſtances were here obſerved: wherefore the levying by warrant from the ſteward was ill, and therefore, &c.—ALL THE COURT was of this opinion; and thereupon it was adjudged for the plaintiff.

CASE 14.

Favely *againſt* Eaſton.

Vide ante, page 269.

A fine of lands in places known in a vill is good, without mentioning the vill where the lands are.

S. C. ante, 269. Jones, 301. Godb. 440.

THIS Caſe was now moved again, and argued by HEDLY, *Serjeant, for the defendant*, that this fine is not good. He agreed, that of places known out of any vill or hamlet a fine may be levied for neceſſity; as a *præcipe* may be brought of *a ferry* in places known out of any vill or hamlet, as 34. *Hen.* 6. *pl.* 1. 8. *Edw.* 4. *pl.* 6. is: but a fine cannot be of lands in a vill or hamlet by the name of a place known, for the vill being the principal ought to be named; and the place known may be known by one name one day, and at another day by another name, according to the name of the parties who are owners thereof; and a fine ought to be levied by a name certain, becauſe it is to bind a ſtranger, by 12. *Edw.* 4. *pl.* 37. and 3. *Edw.* 4. *pl.* 27. Addition, in a writ of debt or other action where proceſs of outlawry lies, ought not to be but of the vill or hamlet, and not of the place known; wherefore this fine being of lands in a place known within a vill is not good.

3. Com. Dig. 345, 346. 2. Bac. Ab. 544, 545. Cruiſe, 125.

NOY, *Attorney General, è contra.* The fine is good, for the fine is drawn according to the writ of covenant, and the writ of covenant is guided by the indenture and agreement of the parties, *viz.* what they agree to paſs by ſuch names, and it ought not to vary; and if it vary from the deed, the other is not bound to levy the fine: and he relied upon THE YEAR-BOOKS 21. *Edw.* 3. *pl.* 14. 1. *Hen.* 5. *pl.* 9. 29. *Edw.* 3. *pl.* 11.

And ALL THE JUSTICES *ſeriatim* delivered their opinions, that it was a good fine. Whereupon it was adjudged for the plaintiff.

CASE 15.

Smith *againſt* Hodgeſkins.

Eaſter Term, 8. *Car.* 1. *Roll* 104.

To an action for ſaying, "*I charge you with* FELONY," it is no juſtification that the plaintiff aſſaulted the defendant, and that he uſed theſe words to induce the conſtable to take him into cuſtody for the aſſault. Ante, 271.

S. C. Jones, 302. 1. Roll. Ab. 43. 3. Term Rep. 183.

ACTION FOR WORDS; for that the defendant *malitioſè et falsò crimen felloniæ ei impoſuit*, and cauſed him to be arreſted for felony.

The defendant pleads, that the plaintiff aſſaulted him upon the highway near *Highgate*, and beat him: whereupon he complained to the conſtable of this matter, and deſired the conſtable to attach him; and he refuſed, unleſs the defendant would ſay that "he "charged him with felony;" which ſpeaking, occaſioned as aforeſaid, is the ſpeaking.

The plaintiff upon this plea demurs.

GRIMSTON now moved, that this is no colour of plea, for the defendant doth not ſhew any cauſe to charge him with felony; therefore it is no excuſe or cauſe of juſtification of theſe words.

ALL

ALL THE COURT were of this opinion; and gave rule for judgment for the plaintiff, unleſs, &c. SMITH *againſt* HODGESKINS.

AFTERWARD, at the day given, the defendant by WARD moved, that the action lies not for theſe words; for it is, that *crimen feloniæ ei impoſuit*, which is not in itſelf cauſe of action: and for that he cited the caſe of *King v. Mellor* (*a*), where an action on the caſe was brought, becauſe *crimen feloniæ ei impoſuit*, and ſaid to the conſtable preſent, "I charge you to arreſt him for felony." And, after verdict for the plaintiff, it was moved in arreſt of judgment, that theſe words were not actionable; and adjudged by the Court for the defendant; and ſhewed a copy of the record. Ante, 271.

JONES, *Juſtice*, ſaid, he was Judge at that time in this court, and doth not remember any ſuch caſe; but if it were adjudged, it was becauſe the words be not laid to be ſpoken *of* the plaintiff. And as this caſe is, he conceived clearly that the action lies; for it is a malicious ſcandal when he chargeth him with felony, and in his own ſhewing doth not ſay what felony was committed. 1. Roll. Ab. 4.

BERKLEY, *Juſtice*, and MYSELF (RICHARDSON, *Chief Juſtice*, being abſent) were of this opinion. Whereupon rule was given that judgment ſhould be entered for the defendant, unleſs, &c.

(*a*) Poph. 201. Latch. 175. Bendl. 202.

Lawrance *againſt* Woodward.

CASE 16.

ACTION FOR WORDS; becauſe he ſaid *falsò et malitioſè* of the plaintiff, "Thou didſt violently, upon the highway, take "my purſe from me, and four ſhillings twopence in it, and "didſt threaten me to cut me off in the midſt; but I was forced to "run away to ſave my life;" and that he accuſed him before *Mr. Cheſter*, juſtice of the peace.

To ſay that another "*violently* "*and by threats* "*took a purſe on* "*the highway*," imports a charge that he took it "*feloniouſly and* "*by robbery*."

PRYNNE, after verdict, upon *not guilty*, moved in arreſt of judgment, that an action lies not for theſe words; for he doth not ſay that he *robbed him*, nor that he *feloniouſly took away his purſe*: and it may be taken *in mitiori ſenſu*, that he took it in jeſt, or in other manner, which was not felonious: alſo it is the more inforced, becauſe it was but an accuſation before a juſtice of peace; and for an accuſation in form of juſtice an action lies not.

1. Roll. Ab. 66. 74. Jones, 302. Yelv. 58. 145. Cro. Jac. 312. 162. Ld. Raym. 0 59. Bull. N. P. 5.

I doubted thereof, becauſe it is not a direct charge of a felonious taking or robbery, by reaſon of the caſe of *Holland v. Stonner* (*a*), where the defendant ſaid, "Thou art a lewd fellow, thou "didſt ſet upon me by the highway, and didſt take from me my "purſe and twenty marks in it, and I will be ſworn to it." Being adjudged in the king's bench for the plaintiff, it was reverſed in the exchequer chamber; for he doth not charge him with felony or robbing of him.

But RICHARDSON, *Chief Juſtice*, JONES, and BERKLEY, *Juſtices*, held, that the action lay; for "violently taking from him his "purſe, and threatening to kill him, and that he was in fear of "his life," is a deſcription that he took it from him felonioufly and by robbery. Whereupon rule was given that judgment ſhould be entered for the plaintiff. Yelv. 58. 145.

(*a*) Cro Jac. 315, 316.

Case 17.

Le Marchant *againſt* Rawſon.

Ante, Page 275.

If the ſheriff return 23 on the *venire*, and 24 on the *hab. cor.* and the 24th, omitted in the *venire*, appear and is ſworn, the error after verdict is amendable. Ante, 223. Jones, 302.

THIS Caſe was now moved again.—And ALL THE COURT, *ſeriatim*, delivered their opinion, that it is but a default in the clerk, and is amendable; for the record being good, and the clerk having it before him, it was merely a miſpriſion of him: and the Juſtices of *niſi prius* having a good record and a good iſſue, and that tried, it is well enough; for they have ſufficient by the record itſelf, by which it appears unto them what is the iſſue; and the writ of *diſtringas* with the *niſi prius* is a ſufficient warrant for them to proceed. And ALL THE COURT conceived, it is directly within the 8. *Hen.* 6. c. 12. and amendable.

1. Roll. Ab. 202. Cro. Jac. 158. 162. 355. 647. Cro. Eliz. 258. 1. Term Rep. 782.

The clerks in court cannot amend a record without permiſſion of the Court.

In the principal caſe the clerk, before and without direction of the Court, had amended it, which amendment was ordered to ſtand, and that the plaintiff ſhould have his judgment: but becauſe it was the default of the clerk of the treaſury, to commit ſuch a groſs offence, he was fined forty pounds, and the clerk who made the amendment, without the Court's direction, was committed to priſon (*a*). *Dyer*, 260. 2. *Hen.* 4. 6. 7. *Edw.* 4. 15. 2. *Rich.* 3. 11. 11. *Hen.* 6. 11.

(*a*) See Caſes in Crown Law, 183, 184.

Case 18.

Fines *againſt* Norton.

Trinity Term, 8. *Car.* 1. *Roll* 1386.

If one of the jurors who try a cauſe be not one of thoſe returned in the *venire facias*, it is a miſ-trial. S.C. Jones, 300.

ERROR of a judgment in the common pleas in *aſſumpſit*. The defendant pleaded "*non aſſumpſit*;" which was found againſt him, to his damages of four hundred pounds, and judgment accordingly.

The error aſſigned was, Becauſe upon the *venire facias* three-and-twenty jurors were returned, and in the *habeas corpora* there were four-and-twenty, *viz.* the three and-twenty who were returned upon the *venire facias*, and one *Walter Lambert*, who was not therein returned; and being returned by *diſtringas*, twelve of them were ſworn, whereof the ſaid *Walter Lambert* was one; and the iſſue tried by them: whereupon judgment being given, this was aſſigned for error, and to be a miſ-trial; for it is tried by one who was never returned by the ſheriff upon the *venire facias*.

ALL THE COURT, who *ſeriatim* delivered their opinions, held this to be a manifeſt error, and not aided by any of the ſtatutes of 32. *Hen.* 8. c. 30. 18. *Eliz.* c. 14. or 21. *Jac.* 1. c. 13.; for a juror miſ-named is not a juror, who was never returned by the ſheriff, ſo as he appearing is ſworn without warrant, and is one added for the pleaſure, and peradventure by the nomination of the plaintiff: this is *caſus omiſſus* out of all the ſtatutes, and not remedied by any of them, nor can it be aided by the examination of the ſheriff. But if twelve of the twenty-three returned had been ſworn, and not the ſaid *Lambert*, it had been aided by the 18. *Eliz.* c. 14. as appears in *Tyrrell* v. *Gardiner* (*a*). Wherefore for this cauſe the judgment in the common pleas was reverſed.

Ante, 223.

(*a*) 5. Co. 37. 5. Co. 42.

Young

Young *againſt* Stoell.

CASE 19.

ACTION ON THE CASE, for diſturbing the plaintiff to exerciſe THE OFFICE OF REGISTER in *Rocheſter*; and ſhews, that the office was an ancient office, and grantable as well in reverſion as in poſſeſſion; and that in the year 1622 this office was granted to him by the *Biſhop of Rocheſter*, HABENDUM *poſt mortem vel ſurſum redditionem* of *J. S.* who held it for life, *exercendum per ſe vel ſufficientem deputatum ſuum cum vadiis, &c.*

An ancient grant may be given in evidence to ſhew that an office was ancient and grantable in reverſion. Poſt. 555. S.C. Jones, 310. 2. Roll. Ab. 153. Ld. Ray. 49. 53. Cowp. 110. 214. 1. Term Rep. 466.

Upon not guilty pleaded, and trial at the bar, the plaintiff, upon the evidence to prove it was an ancient office and grantable in reverſion, ſhewed a grant of 4. *Edw.* 6. to one *Robinſon* in reverſion, after the death of *Buſhfield and Buſhfield*, and confirmed by the dean and chapter, which was *in eſſe*, the 1. *Eliz.* and that in 7. *Eliz.* he ſurrendered and took a new grant to him and *J. S.*

And it was held by ALL THE COURT, that this was a good inducement, that it was anciently ſo grantable in reverſion, but being matter of fact, was to be left to the jury: but they conceived, if it had not been uſually and anciently granted in reverſion, yet being granted before the ſtatute of 1. *Eliz.* c. 4. and being *in eſſe* at the time, and the eſtate confirmed by the dean and chapter, that it was a good grant.

SECONDLY, It was moved, that the reverſion of an office cannot be granted by a common perſon.—And it was agreed by THE COURT, that it cannot be granted as a reverſion, and by the name of a reverſion; for there is no reverſion of an office unleſs it be an office of inheritance, yet it may well be granted in reverſion, *habendum* after the death of the grantee for life.

The reverſion of an office cannot be granted by the name of a *reverſion*; but a grant *habendum* after the death of the grantee is good.—Dyer, 259. a. Jones, 311. 1. Sid. 81. 10. Co. 61. 11. Co. 4. a. Cro. Car. 336. 3. Bac. Abr. 735, 736.

THIRDLY, It was moved, that this grant in reverſion to *Young* is void, becauſe he was a perſon unable at the time of the grant to exerciſe it, for he was an infant of the age of eleven years and no more: and although it be granted to him, HABENDUM *et exercendum per ſe vel ſufficientem deputatum ſuum*, yet it is not good; for an infant cannot make a deputy: and although at the time when the tenant for life of the office died, he was of the age of thirty years, yet being void at the time of the grant, it cannot be made good by any ſubſequent act.

A grant of the reverſion of the office of regiſter to an infant of eleven years of age *exercendum per ſe* VEL *ſufficientem deputatum ſuum, &c.* is good. Poſt. 556. 2. Roll. Ab. 153. Co. Lit. 3. note (4). Cro. Eliz. 637. 1 Jones, 310. 2. Jones, 126. 3. Com. Dig. 165. 4 Com. Dig. 285. Cowp. 226.

But JONES, BERKLEY, and MYSELF (RICHARDSON being abſent) held, that the grant was good, notwithſtanding that exception; for the grant is not void becauſe at that time he was an infant, or becauſe an infant cannot make a deputy: for an infant who can write and underſtand the *Latin* tongue may be a regiſter, and may have ſufficient knowledge to write and regiſter acts, which is ſufficient for his place; at leaſtwiſe he may have ſufficient knowledge to make an able deputy; and if he put in one who is inſufficient, it is cauſe of forfeiture of the office; but as this caſe is, it was granted to him in reverſion after the death of the then regiſter, and he being able to exerciſe it at ſuch time as the office fell, it is ſufficient.

Grant.

FOURTHLY, It was objected, that the office was uſually granted with a fee of a robe, *or* thirteen ſhillings fourpence; and here the office is granted with the fee of the robe, and not in the disjunctive, *or* thirteen ſhillings fourpence.—*Sed non allocatur:* for it being after the grant in the HABENDUM ſhall not make the grant to be void; and it is only void *quoad* the fee.

Antè, 49.

THE COURT ſaid to the jury and counſel, that if they will, they may find the matter ſpecially; but no ſpecial verdict was given, but a general verdict for the plaintiff.

CASE 29.

The Caſe of the Foreſt of Dean.

Eaſter Term, 8. Car. 1. Roll .

If the lord incloſe and approve the waſte land, and the fences are thrown down in the *night*, an *original writ* ſhall iſſue to enquire who the malefactors are; and if the ſheriff return that it was by perſons unknown, *a diſtringas* ſhall iſſue againſt the inhabitants of the adjacent towns, to enquire and make good the damage.
Poſt. 439. 580.
Jones, 306.
2. Inſt. 86.
473. 476.
Skinner, 93.
Dyer, 47. 316. 339.
4. Co. 38.
11. Co. 74.
2. Roll. 365.
Lut. 144. 157. 170. 176.
Raym. 487.
Show. 106.
2. Sid. 107.
2. Lev. 108.
2. Mod. 66.
2. Com. Dig. 431.
2. Hawk. P. C. 291.
2. Term Rep. 391.
3. Term Rep. 445.

A WRIT iſſued out of the chancery, bearing date 13. *March*, 7. *Car.* 1. to the ſheriff of *Glouceſter*, commanding him *per ſacramenta proborum et legalium hominum de comitat. prædict.* to enquire, *qui malefactores et pacis regis perturbatores apud foreſtam de* DEANE, *ſepes et foſſata* JOHAN. GIBBONS *ibid. per ipſum nuper levat.* NOCTANTER, *aut tali tempore, quo factum eorum ſciri non credebant, proſternaverunt*, to the damages of the ſaid JOHN, *et contra pacem. Et ſi prædictus* JOHAN. *fecerit te ſecurum de clamore ſuo proſequendo, tunc pone per vadios et ſalvos plegios, omnes illos quos culpabiles ibidem inveneris, quòd ſint coram nobis in Quindenâ Paſchæ ubicunque, &c. ad reſpondendum nobis de pace fractâ quam prædicto* JOHANNI *de tranſgreſſione, &c.*

The ſheriff at *Quindena Paſchæ* returned the inquiſition, *quòd virtute brevis prædict. ad inquirendum* (reciting the writ) *per ſacramentum duodecim, &c. qui dicunt ſuper ſacramentum ſuum, quòd quidem malefactores et pacis regis perturbatores vi et armis ſepes*, VIZ. 769 *particarum ſepium et foſſarum ipſius* JOH. GIBBONS *apud foreſtam de* DEANE, *nuper ante per ipſum levat. proſternaverunt; ſed qui aliquam partem inde proſtraverunt juratores prædicti ignorant. Et ſimiliter dicunt quòd vi armatâ, et cum multitudine gentium, malefactores et pacis perturbatores prædicti fuerunt; ita quòd nullus ad ipſos appropinquare ad ipſos cognoſcend. auſus fuit, et tali tempore quo factum eorum ſciri non credebant, ſepes et foſſata prædicta proſtraverunt et redierunt.*

Hereupon *a writ of diſtringas* iſſued reciting the firſt writ, and the inquiſition thereupon returned, and commanding the ſheriff of *Glouceſter*, "*quòd diſtringat propinquas villatas ſepibus et foſſatis* "*prædictis circum adjacent. prædictas ſepes et foſſata proſtrata levare* "*ad cuſtodes ſuos proprios.*" And by the ſame writ it was commanded to enquire *quæ damna prædictus* JOHAN. GIBBONS *occaſione proſtrationis prædictæ* 769 *particarum ſepium et foſſarum ſuſtinuit, et damna illa eid.* JOHAN. GIBBONS *reſtituere*, and to return the writ and inquiſition in *Octab. Trin.*

The ſheriff hereupon certified, *quòd villa de* BRETILLS, *et viginti aliæ villæ* (naming them), in the county of *Glouceſter*, *ſunt propinqua villata ſepibus et foſſatis infra mentionatis circumadjacentes*; and further certified, *quòd damnum in quâdam inquiſitione brevi annexat. eid.* JOHAN. GIBBON, *propter brevitatem temporis reſtituere non poteſt*; and returned iſſues upon every of the ſaid villages, and that the reſidue of the execution of the writ appeared *in quâdam inquiſitione eidem brevi*

brevi annexat. and returned the inquisition, whereby was found, that the said JOHN GIBBONS *sustinuit damnum occasionat' p' præmissorum ad* 200l.

The CASE of the FOREST of DEAN.

BRAMPSTON, *Serjeant*, upon this return, took divers exceptions:

FIRST, For the *forest of Dean*; there is not any parish named wherein it lies.—*Sed non allocatur*: for a forest is certain enough by itself.

A venue to a *forest* need not state in what *parish* it lies.

SECONDLY, Because this writ is founded upon the statute of *Westminster* the Second, c. 46. that if THE LORD hath right to improve any his waste, &c. and his hedges be destroyed *noctanter*, and it cannot be known by the verdict of the assise or jury who those malefactors were, the towns near adjoining shall be distrained to levy the hedge or dyke at their own costs, and to yield damages: and he doth not shew here that he is THE LORD of the said waste, and hath right to improve it.—But NOY, *the King's Attorney*, who devised this writ, said, that it sufficeth in a writ to shew the grief *breviter*; and if he be not any such person as may inclose, it ought to be shewn on the other side.

A writ of *noctanter* need not shew that the party injured was lord of the soil; for it is sufficient to state the grievance *breviter*. Post. 441. 1. Show. 106.

THIRDLY, It was objected, that this inclosure is not shewn to be with the king's licence, and then it is without warrant: but thereto was answered, that it ought to come in by plea, after appearance, and not by way of exception.

The fact of "approvement "without licence" cannot be *moved* against proceeding in a *noctanter*, but must be *pleaded*. 2. Com. Dig. 431.

NOY, *the King's Attorney*, also moved, that they had no day in court, because the writ and the inquisition were returned the last Term, and they then not appearing and pleading, they shall not be received to come in by way of exceptions in this manner. And he shewed a record in *Trinity Term*, 15. *Edw.* 1. *Roll* 3. where such a writ was awarded for one *Nicholas de Stapleton*, whose hedges were cast down *noctanter*, and not being known by whom, he had a writ to distrain *propinquas villas* to repair; and he said, that was the precedent for this case: and he prayed a new *distringas* might be awarded. *Et habuit* (*a*).

If the inhabitants do not appear and plead on the return of the *distringas*, on a writ of *noctanter*, they cannot take exception to the return. Post. 440. 1. Sid. 107. Lut. 157. 2. Com. Dig. 432.

(*a*) See 29. Gen. 2. c. 36. and 31. Geo. 2. c. 41. for the modern mode of inclosing commons for planting; and the punishment of those who prostrate the inclosure.

Johns *against* Staynar.

CASE 22.

Vide Ante, 272.

THIS Case was now moved again by ROLLE, *for the defendant* in the writ of error: and he vouched the case of *Calthorp v. Culpeper* (*a*), where trespass of assault and battery was brought and tried in *Middlesex*, and the bill upon the file was in *London*, it was resolved, that it was a declaration and trial without bill, which is aided by the statute; wherefore it was there adjudged for the plaintiff. And another precedent, *Kelley v. Reynell* (*b*), where debt was brought in *Exeter*, and the writ supposed it to be within the county of *Devon*, after verdict it was held, that the writ in one county cannot be intended for an action in another county, and therefore it was a trial without an original.—But ALL THE COURT here

In ejectment, if the *ouster* be alledged after the *teste* of the *original*, judgment is erroneous. Ante, 90. 272. Post. 327. 8. C. Jones, 304. Cro. Jac. 479. Cro. Eliz. 722. 1. Com. Dig. 106. 1. Bac. Ab. 92. 97, 98.

(*a*) Cro. Jac. 655. (*b*) Cro. Jac. 674.

JOHNS *against* STAYNAR.

held, that this judgment was erroneous, becauſe this original is certified as an original in this action, which is betwixt the ſame parties of the ſame land and of the ſame term, and being taken out before the cauſe of action, it is a vicious and an ill original, not aided by any ſtatute; and compared it to *Biſhop's Caſe* (*a*): whereupon they all agreed, that the judgment was erroneous; and therefore it was reverſed.

(*a*) 5. Co. 37.

CASE 22.

John George and his Wife *againſt* Harvy.

To ſay, "You "are a witch, "and a ſtrong "witch," is actionable. See poſt. 324.

ACTION ON THE CASE; for that the plaintiff having communication at *Bury* with the defendant of his the ſaid plaintiff's wife, the defendant ſaid, "She," *innuendo* the plaintiff's wife, "is a witch, and a ſtrong witch."

Jones, 325. Ante, 141. Poſt. 320. 1. Com. Dig. 292.

WHITFIELD moved in arreſt of judgment, that theſe words are not actionable, unleſs he had ſaid, ſhe committed witchcraft in bewitching ſome perſon or his goods, ſo as ſhe ſhould be puniſhable by the 1. *Jac.* 1. c. 12. (*a*); for the word "witch" generally is but a word of ſcolding, and moſt commonly uſed of bewitching one with his words or countenance; and he ſaid, it was ſo adjudged in *Hawkes v. Auge* (*b*).

But it was alledged on the other ſide by GRIMSTON, that in *Hughs v. Farrer* (*c*), for calling one "witch, and that ſhe had be-"witched his drink," it was adjudged that the action well lies.

But becauſe it was ſaid there were precedents both ways, the Court would adviſe (*d*).

(*a*) Repealed by 9. Geo. 2. c. 5. See 2. Hawk. ch. 4. ſ. 5.
(*b*) Cro. Jac. 531.
(*c*) Ante, 141.
(*d*) It was moved again in Michaelmas Term, and adjudged for the defendant. Poſt. 324.

CASE 23.

Collis *againſt* Malin.

Trinity Term, 8. *Car.* 1. *Roll* .

A declaration for ſcandalous words againſt a trader muſt aver that he was a trader at the time the words were ſpoken. 1. Jones, 304. Cro. Eliz. 273. Cro. Jac. 222. Yelv. 21. 159. 2. Com. Dig. 195. Salk. 694. Stra. 636. 1169. Ld. Ray. 1417. 2. Burr. 1688.

ACTION FOR WORDS. Whereas the plaintiff had uſed *per magnum tempus* the trade of buying and ſelling of cattle, and divers times bought upon his credit; that the defendant ſaid of him, "*Thou art a bankrupt!*" The defendant pleaded not guilty; and found againſt him.—And becauſe he did not ſay, that he uſed the trade at the time of ſpeaking the words, but *per magnum tempus uſus fuit*, which may be divers years before, and the action lies not, unleſs at the time of ſpeaking the words he uſed the trade of buying and ſelling of cattle, therefore it was adjudged for the defendant.

CASE 24.

Parker *againſt* Grigſon.

Trinity Term, 8. *Car.* 1. *Roll* 139. *or* 1306.

The want of a bill on the file in ejectment is aided, after verdict, by 18. *Eliz.* c. 14. Jones, 304. Hob. 130. 1. Com. Dig. 310. 3. Ter. Rep. 657.

EJECTMENT. After verdict, it was moved by GRIMSTON in ſtay of judgment, that there was not any bill upon the file; and it was prayed, that the Court would order that none might be filed.—But THE COURT held it to be aided by the equity of the 18. *Eliz.* c. 14.; and in *Woodhouſe v. Willis* (*a*) it was ſo reſolved in a writ of error. Wherefore judgment was given for the plaintiff, notwithſtanding this exception.

(*a*) Trinity Term, 16. Jac. 1. Roll. 945.

Stirley

Stirley *againſt* Hill.

CASE 25.

ACTION FOR WORDS; for that he ſaid to the brother of the plaintiff, "Thy brother was whipped about *Taunton Croſs* "for ſtealing of ſheep, or burned in the hand or the ſhoulder." After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arreſt of judgment, that theſe words do not import any certain ſlander.—And of that opinion was ALL THE COURT. Wherefore it was adjudged for the defendant.

Words not importing certain ſlander are not actionable.

Jones, 308.

Gryſill *againſt* Whichcott.

CASE 26.

Trinity Term, 8. Car. 1. Roll 420.

DEMURRER in ejectment. The queſtion was, If one mortgage land for one hundred pounds, and take bond for the intereſt of eight pounds *per annum*, payable half-yearly, whether that makes the bargain uſurious againſt the ſtatute (*a*)?

It is not uſury to take a bond for the payment of the legal intereſt of a ſum of money on mortgage, although made payable *half-yearly*.

Ante, 17.

Poſt. 501.

Becauſe, as it was pretended, the uſe ought not to be paid until the end of the year, and contracting to have half of it yearly, is not warrantable by the ſtatute.

But THE COURT, upon the firſt argument at the bar, over-ruled it, that it is not any uſurious contract contrary to the ſtatute, becauſe the hundred pounds is let for a year; and the reſervation is not of more, but of what is permitted by the ſtatutes: and although the intereſt is reſerved payable half-yearly, it is allowable, for he doth not receive any intereſt for more or leſs time than his money is forborn; wherefore, without difficulty, it was adjudged for the plaintiff.—And error being brought in the exchequer chamber, and the error aſſigned in point of law, the judgment was affirmed.

Moor, 644. Cro. Jac. 26. 677. Yelv. 30. Jones, 396. 1. Bulſt. 17. 2. Vent, 83. 2. Mod. 307. Dougl. 235.

1. Hawk. P. C. 519. 5. Bac. Abr. 408. Cowp. 112.

(*a*) 21. Jac. 1. c. 17.; but by 12. Ann. c. 16. intereſt is reduced to 5 *per cent.*

Burgaine *againſt* Spurling.

CASE 27.

Vide Ante, page 273. No. 10.

THIS Caſe was now argued again: and it was ſtrongly urged for the plaintiff, that by the firſt ſurrender all the eſtate of the copyhold until the condition performed is out of the ſurrenderor, ſo as he hath not any intereſt left in him to make another ſurrender, although he afterwards ſhould perform the condition; for he cannot make the ſecond ſurrender, which was void, to be good: but when the condition is performed, the eſtate is reveſted in him; and then he might well make the third ſurrender.

If a copyholder ſurrender to *A.* and afterwards ſurrender to *B.* who is admitted, and then the ſurrender to *A.* is preſented at the next court, and he is admitted, he ſhall avoid the admiſſion of *B.*

Poſt. 569.

But it was thereto anſwered, and RESOLVED BY THE COURT, that the ſecond ſurrender is not hindered by the firſt, for nothing paſſed thereby until it was preſented in court, and admittance thereupon; but the intereſt and right of the copyhold and the poſſeſſion remained with him who made the ſurrender, ſo as he may tranſfer it to any other, and it ſhall be good, if the firſt ſurrender doth not take effect; for the ſurrender into the hands of the tenants was but an inchoation of his eſtate to whoſe uſe the ſurrender was made, and

S.C. Jones, 306. 1. Roll. Ab. 473. 500. Co. Lit. 62. Cro. Eliz. 349. Cro. Jac. 103. Pollexf. 50. 1. Term Rep. 600. 2. Term Rep. 484.

BURGAINE *againſt* SPURLING.

Ante, 218. Cro. Jac. 53. Hob. 165. 1. Roll. Ab. 500. Co. Lit. 310, a. 314. b.

ſuch an inchoation as had no perfection, but became merely void, and the ſecond ſurrender good: as a bargain and ſale to one, and after a bargain and ſale to another, the firſt is not inrolled, but only the ſecond, the ſecond is good: ſo a grant of a reverſion to one, and before attornment a grant thereof to another, and to the ſecond grantee attornment is made, the ſecond grant is good, *et nihil operatur* by the firſt: ſo where a fine is acknowledged to one, upon a *dedimus poteſtatem*, and afterward a ſecond is acknowledged, and the firſt fine not recorded, the ſecond fine is good; but if the firſt fine had been recorded in court in time convenient, *viz.* the next Term, it had been good, and the ſecond had been merely void: ſo this firſt ſurrender, when it was not preſented at the next court, is as if none had been made, and merely void *ab initio*; and therefore the ſecond ſurrender good.

Payment *before* the day is a good performance of a condition to pay *at* the day.

SECONDLY, ALL THE COURT AGREED, that whereas in the principal caſe the condition was for the payment of 1060l. *upon* the firſt of *July*, and the payment was made *before* the firſt of *July*, *viz.* upon *decimo ſexto Junii*, and an acceptance thereof, it is a good performance of the condition.

Pl. Com. 291, a. Co. Lit. 212. Cro. Jac. 435. Moor, 47. Cro. Eliz. 142. Dougl. 49. 2. Term Rep. 388. 3. Term Rep. 374. See 4. Ann. c. 16. ſ. 12.

After ſurrender, the eſtate remains in the ſurrenderor until admittance.

Cro. Eliz. 349. Cro. Jac. 403. 3. Bulſt. 218. 1. Roll. Ab. 502.

NOTE, That the firſt ſurrender is merely void, and as if it never had been made; and that after the ſurrender, he who ſurrendered remained always copyholder, ſo as it ſhould deſcend to his heir, and he might diſpoſe thereof: but if the firſt ſurrender had been preſented at the next court, that would have ſo bound the land, as all meſne acts done or made afterwards would have been void. —Judgment for the plaintiff.

3. Lev. 385. 1. Vent. 261. 1. Term Rep. 393. 600. 2. Term Rep. 198.

CASE 28.

Delves *againſt* Clerk.

A promiſe to aſſure land is local, and muſt be tried where the land lies. Poſt. 295. Cowp. 176. 281. 2. Term Rep. 241.

ASSUMPSIT. Whereas the defendant was ſeiſed of ſuch lands in *Chiſlehurſt*, in the county of *Kent*, 21. *May* 1631, in fee, and was in communication with the plaintiff to ſell the ſame for ſuch a ſum; that the defendant, *adtunc et ibidem*, *viz. prædicto* 21. *May* 1631, *apud London. prædict. in parochiâ Beatæ Mariæ*, &c. in conſideration of ſuch a ſum, promiſed to aſſure, &c.—Upon *non aſſumpſit*, the trial was in *London*, and exception taken in arreſt of judgment, that it was a miſ-trial, and not aided by any of the ſtatutes; for it ought to have been tried in *Kent*, where the land lies, and where, by the *adtunc et ibidem*, the promiſe is, and the *venue* cannot be altered.—ALL THE COURT was of this opinion, that the *videlicet* is idle, and may not alter it. Whereupon a *venire facias de novo* was awarded.

Cucko

Cucko *againſt* Starre.

CASE 29.

PROHIBITION was prayed to the ſpiritual court to ſtay a ſuit there for defamation for theſe words: "Thou art a drunkard," or, "a drunken fellow."

Prohibition granted to ſtay a ſuit for calling a man a drunkard. Ante, 111. 229. Poſt. 309.

And by the opinion of JONES, BERKLEY, and MYSELF, a prohibition was granted: for theſe words do not concern any ſpiritual matter, but are merely temporal: and they are but *convitium temporale*, and a common phraſe of brawling, for which there ought not to be ſuit in the ſpiritual court; and ſo it was held in *Martyn Calthorp's Caſe*, in the common pleas.

S.C. Jones, 305. 2. Roll. Ab. 296. 1. Hawk. P. C. 13.

But RICHARDSON doubted thereof, becauſe the ſpiritual court as well as the temporal may meddle with the puniſhment of drunkenneſs; ſo it is not merely temporal: but he aſſented to the grant of a prohibition, and the party may, after declaration, if he will, demur thereto. Whereupon a prohibition was granted.

1. Bac. Ab. 58. Cowp. 424. 1. Term Rep. 552. 2 Term Rep. 473.

Major *againſt* Talbot.

CASE 30.

Eaſter Term, 8. *Car.* 1. *Roll* 419.

COVENANT. Whereas one *Selbie* and *Elizabeth* his wife were ſeiſed of ſuch an houſe and land, to them and the heirs of the huſband, and ſo ſeiſed, by indenture let that houſe and land to the defendant, wherein he covenants with them, and either of them, and with the heirs and aſſigns of the huſband, for doing all reparations; the huſband and wife conveyed that reverſion to the plaintiff in fee, who brings a covenant for not repairing of the ſaid houſe, declaring upon all this matter, and concluding, *quòd actio ei accrevit*, as aſſignee to the huſband, and avers not the wife to be dead.

On *an aſſignment* of land by huſband and wife, where they are ſeiſed to them and the heirs of the huſband, it is ſufficient to declare as *aſſignee* of the huſband.

The defendant demurs; which was argued by ROLLE, *for the plaintiff*, and by MEREFIELD, *for the defendant*; and by him much inſiſted, that the plaintiff having his eſtate, as well from the wife who had an eſtate for life, as from him who had the fee, ought to have brought covenant as aſſignee to both, and not as aſſignee to him who had the inheritance, unleſs the wife's death had been alledged; and for that purpoſe he cited *Treport's Caſe*, 6. *Co.* 15. and *Dyer*, 234. 6.

Jones, 305. Cro. Jac. 240. Cro. Eliz. 823. Carth. 519. Ld. Ray. 224. 1. Peere Will. 378. Stra. 229. 726. 1. Bac. Ab. 306. Doug'. 329. 452.

But ALL THE COURT held, that the action is well brought, being brought by the aſſignee of him who hath the inheritance, and ſo no prejudice to any, and the eſtate for life, being transferred with the fee, is thereby drowned and conſounded; ſo as he being aſſignee of the whole eſtate, and ſhewing all the matter, it is good enough. Wherefore it was adjudged for the plaintiff.

Kercheval *againſt* Smith and Others.

CASE 31.

ACTION on the caſe againſt them, Becauſe they being churchwardens of ———, preſented the plaintiff *falsò et malitiosè* upon a pretended fame of incontinency. Upon not guilty, it was found for the defendants; and moved, that they might have double coſts,

The ſtatute 7. *Jac.* 1. c. 5. and 21. *Jac.* 1. c. 12. giving *double coſts* to Poſt. 467.—churchwardens, &c. do not extend to matters of eccleſiaſtical cognizance. Ante, 175. S. C. Jones, 305.

becauſe

KERCHEVALL *against* SMITH and OTHERS.

2. Hawk. P. C. 61.

because they were troubled and vexed for matter which did concern their office.—But IT WAS RESOLVED, it was not within the ſtatute, for it is merely eccleſiaſtical; and the makers of the ſtatute never intended to give double coſts, but where men are vexed concerning temporal matters, which they ſhall do by virtue of their office, and not for preſentments concerning matters of fame.

CASE 32.

Nevill *againſt* South and Delabarre.

In the Exchequer Chamber.

Error does not lie to the exchequer chamber by 27. *Eliz.* c. 8. on a judgment in *ſcire facias*.
Ante, 142.
Poſt. 300 464.
1. Roll. Ab. 929.
Roll. Rep. 264.
Vent. 38.
Salk. 263.
Cro. Jac. 171.
Ld. Kaym. 97.
12. Mod. 105.
Comb. 393.

ERROR brought in the exchequer chamber of a judgment in a *ſcire facias* by an executor, to have execution of a debt recovered by the teſtator. And it was now moved, that the record was not well removed, for no writ of error lies there upon a judgment in a *ſcire facias*; for the ſtatute 27. *Eliz.* c. 8. gives it only in ſeven ſeveral caſes, *viz.* in ſuits or actions of *debt*, *detinue*, *covenant*, *accompt*, actions upon the *caſe*, *ejectione firmæ*, or *treſpaſs*; ſo a *ſcire facias* is not mentioned: and it hath been adjudged, that error lies not there of a judgment in a *ſcire facias* againſt bail, nor in a writ *de ſcandalis magnatum*.—But THE COURT doubted whether this *ſcire facias*, being grounded upon a judgment in an action of debt, be not within the equity of the ſtatute; therefore they would further adviſe.

2. Bac. Abr. 232. *Sed vide* Wright *v.* Nutt, 1. Term Rep. 388. 2. Term Rep. 46.

CASE 33.

Hitchman *againſt* Porter.

Trinity Term, 8. *Car.* 1. *Roll* 483.

In an action for a malicious proſecution, it is ſufficient for the plaintiff to ſay that he was *legitimo modo acquietatus*, without adding *inde*.
Cro. Jac. 230.
Strange, 114.
1. Com. Dig. 161.
Dougl. 215.
2. Term Rep. 225. 231.
4. Term Rep. 247.

ERROR of a judgment in the common pleas. The error aſſigned was, Whereas an action upon the caſe was brought in nature of a conſpiracy; that the defendant *falsò et malitiosè* impoſed upon him *crimen talis feloniæ*, and cauſed him to be arreſted thereupon, and bound over to the aſſizes, and exhibited a bill of indictment againſt him for that ſuppoſed felony, and cauſed him to be indicted and detained in priſon until he was *legitimo modo acquietatus*; and he doth not ſay "*inde*," which was a principal word, and the principal cauſe of damages: and it was ſaid, that in *Stiles v. Pricket*, for this point judgment was reverſed: and that in this Term, for this default in the like action, betwixt the ſame parties, judgment was given, "*quòd querens nihil caperet per breve*;" and this judgment here in queſtion paſſed *ſub ſilentio*.—*Sed adjournatur* (*a*).

(*a*) It was moved again, and adjudged for the plaintiff. Poſt. 315, 420.

CASE 34.

Lyſter *againſt* Bromley.

Trinity Term, 8. *Car.* 1. *Roll* 235.

A ſheriff may take 12*d.* in the pound for the firſt 100*l.* and 6*d.* *per* pound for every pound above the 100*l.*; and this extends to the ſheriffs of cities and corporations executing judgments out of the *ſuperior* courts; but he cannot take a bond for his fees.

ERROR of a judgment in the common pleas, *viz.* DEBT by the under-ſheriff for his fees, where he demanded 12*l.* 10*s.* for executing of a *capias ad ſatisfaciendum* of 400*l.*

The error aſſigned was, Becauſe he demanded more for his fees than the 29. *Eliz.* c. 4. (*a*) allows (*b*), *viz.* whereas he ought to

(*a*) This ſtatute appears by the parliament Rolls to have been paſſed in the 28th year of Eliz. *Vide* 1. Salk. 331.

(*b*) For ſubſequent ſtatutes which make allowance to ſheriffs, ſee 3. Geo. 1. c. 15. 8. Geo. 1. c. 5. 7. Geo. 3. c. 29. 14. Geo. 3. c. 26.

have

have but ſixpence for every pound where the execution is above 100l. and twelvepence for every pound where the execution is but 100l. or under; he taking 5l. for the firſt 100l. and 50s. for every of the other hundred pounds, had taken more than ſixpence in the pound for the ſaid execution of 400l.: and for this cauſe the error was aſſigned.

LISTER *againſt* BROMLEY.

Jones, 307. 1. Roll. Ab. 738. Cro. Jac. 103. Cro. Eliz. 264. 335. Latch. 5. 17. 21. 187. Poph. 173. Bendl. 191. Noy, 28. 75. 90. Moor, 853. Ante, 150. Winch. 20. 58. 2. Black. Rep. 832. 1103. Salk. 441. 5. Com. Dig. 598. 3. Wilſ. 309. 316. Dougl. 40. 2. Term. Rep. B. R. 148.

But a precedent was ſhewn in *Hilary Term*, 1. *Car.* 1. *Roll* 721. *Jeſſon v. Weſtley*, in this court, where it is adjudged, that a ſheriff ought to have for his fees 5l. for the firſt 100l. and 50s. for every other 100l. over and above the firſt hundred pounds; otherwiſe, if the execution ſhould be for 120l. or 160l. he ſhould have leſs than for the execution of 100l. which never was the intent of the law; for the law gives allowance to the ſheriff for executing proceſs, which by conſtruction ſhall be moſt favourably taken, and according to the intent of the law-makers, and not that he ſhall have leſs for the execution of 140l. than for the execution of one hundred pounds. Another precedent was ſhewn in *Eaſter Term*, 14. *Jac.* 1. *Roll* 537. where was the like judgment.

ALL THE COURT, *abſente* RICHARDSON, were of this opinion; but we would adviſe.—The next day, RICHARDSON, *Chief Juſtice*, being in court, it was moved again, and the record betwixt *Jeſſon, Sheriff of Coventry, v. Weſtley* was produced, wherein he declares in debt for his fees 12l. 10s. for taking execution of a judgment of 400l. And upon this declaration it was demurred, and two queſtions then made: Firſt, Whether the ſheriff may demand twelvepence in the pound for the firſt 100l. and ſixpence after for every 100l. or that he ought to have but ſixpence in the pound where the ſum exceeds 100l.? And it was adjudged, that he ſhall have twelvepence for every pound of the firſt 100l. and ſixpence for every other pound over the 100l. Secondly, Although it be provided in the 29. *Eliz.* c. 4. that this ſhall not extend to ſheriffs of cities or corporations, it was held, that it was only to be intended for the executing judgments in the courts of the ſaid corporations (*a*), and not to the ſheriffs of cities or corporations, for the executing judgments out of ſuperior courts. Another precedent was ſhewn in *Eaſter Term*, 4. *Jac.* 1. *Roll* 551. *Proby v. Michell* (*b*), in an action of debt for fees, and adjudged accordingly. And whereas GRIMSTON cited a caſe in the common pleas, in *Michaelmas Term*, 17. *Jac.* 1. of *Symſon v. Bathurſt*, where the opinion was, that the ſheriff ought to have but ſixpence in the pound where it is above 100l. and that the judgment was there entered for the defendant—JONES, *Juſtice*, ſaid, the reaſon of that judgment was not for the cauſe now alledged, but for that the ſheriff had taken a bond for his fees, and had brought an action of debt upon that bond; and the defendant had pleaded the 23. *Hen.* 6. c. . in avoidance thereof. The Court there conceived, although he might have ſuch fees as were allowed by the ſtatute, yet he might not take bond for them; for under colour thereof he might ſo have double fees, &c.—Wherefore here, after argument, the judgment was affirmed (*c*).

(*a*) *Vide* 3. Geo. 1. c. 15.

(*b*) Moor, 835. 1. Roll Rep. 404.

(*c*) On *ca. ſa. ſcire facias*, or *elegit*, the ſheriff ſhall have fees on the whole debt. Salk. 331. 209. 333. Skin. 363. 5. Mod. 97. and on an extent, 2. Jones, 185. Parker, 177. Burr. 1984.

Drake

Case 35.

Drake *againſt* Corderoy.

Michaelmas Term, 7. Car. 1. Roll 280. or 28.

In an action for theſe words, "*You are for-*"*ſworn,*" the omiſſion of ſtating in what court the oath was taken is aided by a juſtification that the falſe oath was taken at ſeſſions.
Ante, 209.
Poſt. 385. 560.
S.C. Jones, 307.
S. C. 1, Roll. Ab. 41.
8. Co. 120.
Cro. Eliz. 354.
Hob, 82.
2, Rol', Rep. 66.
Cro. Jac. 125. 370. 668.
Lutw. 253. 632. 1492.
3. Lev. 393.
Forteſ. 377.

ERROR of a judgment in the common pleas in an action for words. Whereas the plaintiff was conſtable of *D.* and ſworn before the juſtices of peace in the county of *Wilts*, at their quarter ſeſſions, concerning an affray made by the defendant upon one *Fiſher*; that the defendant, *ad tunc et ibidem* in the ſaid court, in the preſence of the juſtices, ſaid, "He (*innuendo* the plaintiff) is "forſworn," without any mentioning of the ſaid oath. The defendant juſtifies, ſhewing the oath which he made in the open ſeſſions, and that it was falſe. Upon which juſtification the plaintiff takes iſſue, which was found; and judgment given for the plaintiff.

The error was aſſigned, that the words are not actionable, becauſe he doth not ſay in the declaration that he was forſworn by his oath taken in any court; and to ſay generally that the plaintiff is *forſworn*, an action lies not; but to ſay he is *perjured*, an action lies. And here it is not ſhewn that he was forſworn by reaſon of his oath taken at the ſeſſions; wherefore the declaration is not good, nor is it aided by the plea.

But ALL THE COURT held, that if there were any doubt, it was upon the declaration, which was uncertain, becauſe he doth not ſhew that the words intended a falſe oath in a court of record; yet when the defendant by his plea confeſſeth he ſpake thoſe words by reaſon of his oath taken at the ſeſſions, that clears the queſtion whereof he intended to ſpeak. Wherefore the judgment was affirmed.

Case 36.

Bland *againſt* Inman.

Hilary Term, 7. Car. 1. Roll 550.

A termor and his wife on the one part aſſign all the term "*reddendo et ſol-*"*vendo*" to him and his wife "*durante termi-*"*no prædicto*," and to the ſurvivor of them, *if they ſhall live ſo long*, with a PROVISO to re-enter on non-payment of the rent to him, *or* his wife, *or* the ſurvivor, *or* their aſſigns, *or* the aſſigns of the ſurvivor.—This reſervation ſhall continue only during "*the life* "*of the huſband* "*and wife*," and to her is void, not during "*the term*;" and if the wife has omitted to execute the deed, the reſervation as and will continue no longer than the life of the huſband.

TRESPASS. Upon a ſpecial verdict the caſe was, *Thomas Spence*, poſſeſſed of a leaſe for a hundred years, by indenture betwixt him and *Joan* his wife of the one part, and *Tiſdale* on the other part, which is found to be ſealed and delivered only by *Spence*, and not by his wife, aſſigns all their eſtate in the leaſe to *Tiſdale*, *reddendo et ſolvendo* to him and *Joan* his wife, *durante termino prædicto*, to them and the ſurvivor of them, if they ſhall live ſo long, 7l. at *Michaelmas* and the *Annunciation*, with a PROVISO, "That if the "ſaid rent be behind at any of the ſaid Feaſts, or forty days after, "and not paid to him or his wife, or the ſurvivor of them, that "then it ſhall be lawful to the ſaid *Spence* and his wife, and to the "ſurvivor of them, and to their aſſigns, and to the aſſigns of the "ſurvivor of them, to re-enter and have again, as in their for-"mer eſtate." *Tiſdale* enters, and *Spence* dies, and *Joan* ſurvives him, and for forty days after the *Annunciation* next following, the rent being behind and not paid, the wife the laſt day demands it; and one *Walter*, the adminiſtrator of *Spence*, demands alſo the rent which is not paid. *Tiſdale* aſſigns his eſtate to the plaintiff, and *Walter*, as adminiſtrator of *Spence*, enters for non-payment, and lets to the defendant; and if, &c. This caſe was oftentimes argued at the bar, and after at the bench.

THE

BLANK *against* INMAN.

THE FIRST QUESTION was, Whether this reſervation be good to the wife, becauſe ſhe had not any intereſt to paſs, and never ſealed the deed?—and, if it be not good to the wife, becauſe ſhe is a ſtranger to the intereſt and to the deed, Whether it be not good to the huſband, and to his executors and adminiſtrators as aſſigns in law, during the time of the wife's life?—and, Whether the adminiſtrator, for the benefit of the wife, ſhall not enter into the land?

Godb. 448. 2. Roll. Ab. 450. 1. Jones, 308. 12. Co. 36. Cro. Eliz. 217. 832. Owen, 9. Latch. 99. 255. 264. 2. Saund. 360. 370. 5. Co. 111. 1. Vent. 148. 161. Raym. 213. 2. Lev. 13.

GRIMSTON, *on the part of the defendant*, urged, that the words being "*reddendo et ſolvendo*" to the huſband and wife *durante toto termino*, and to the ſurvivor of them, it being by indenture, is good, by way of reſervation to the huſband; and the word *ſolvendo* ſhall be conſtrued as by way of grant to the wife: for although ſhe did not ſeal, yet ſhe being named in the deed, and the party grantee ſealing and delivering it to the huſband and wife, it ſhall be conſtrued by way of grant to her; and ſhe may take by the deed, being named therein, although ſhe never ſealed any part thereof.

BERKLEY, *Juſtice*, was of that opinion; and cited one *Conſtable's Caſe*, that where leſſee for years aſſigned his term, rendering rent *durante termino* annually to him, that includes his executors and adminiſtrators, although they be not named: as in the caſe of *Littleton* (*a*), condition to pay a ſum to a feoffee ſuch a day, and he dies before the day, it ſhall be paid to his executors, for they repreſent the teſtator.—To the ſecond, BERKLEY conceived, If it be not good to the wife, neither by way of a reſervation, as he agreed that could not be, becauſe ſhe is a ſtranger to the eſtate and to the deed; yet by way of grant, by the words "*reddendo et ſolvendo*," he conceived, the deed might take effect; yet he held, that the adminiſtrator is aſſignee, who may enter for the condition broken, for the wife's benefit.

But RICHARDSON, *Chief Juſtice*, JONES, and MYSELF agreed, that although the *reddendo et ſolvendo durante termino*, if there had been no more ſaid, had been a reſervation *during the term*; yet when he doth not reſt upon the expoſition of the law, but it is, "rendering to him and his wife, and the ſurvivor of them, if they "live ſo long," that is an expreſs reſervation that it ſhall not be during all the term, but to him and his wife and the ſurvivor of them: and the reſervation to his wife is void, becauſe ſhe is no party in intereſt or to the deed; and "to the ſurvivor of them" is void alſo to give the wife any advantage thereby; and therefore the rent endures no longer than during the life of the huſband. *Vide* 10. *Edw.* 4. 18. 21. *Hen.* 7. 25. 8. *Co.* 70. b. *in Whitlock's Caſe*, *Co. Lit.* 47. a. & 143. b. *and Hilary Term*, 33. *Eliz. Richmond v. Butcher*, where one lets reſerving rent to him his executors and aſſigns, he having an inheritance in the land, it was adjudged a void reſervation to the executor, the reverſion being in the heir, yet the rent ſhall not be paid unto him becauſe he is not named; and although it were there *durante termino*, it was not material.—And JONES ſaid, that ſo it was adjudged in *Brown v. Shurrey* (*b*), 2. *Car.* 1.—Alſo THEY ALL HELD, that here this word "*ſolvendo*" cannot enure by way of grant to the wife, when it is by way of reſervation to the huſband; for it ſhall not be conſtrued to enure in

R. 613.

R. 159.

Dyer, 45. a. Co. Lit. 213. a. 8. Co. 70. Plowd. 243. Co. Lit. 47. a. 2. Saund. 367. Cro. Eliz. 217.

(*a*) Sect. 339. (*b*) 2. Roll. Ab. 451.

ſeveral

BLAND against INMAN.

several manners, no more than if one bargains, sells, demises, and grants, it shall not enure by bargain and sale and demise, but by the one of them, at the election of the bargainee: and in the reservation *assignee* is not mentioned; so that it cannot give any interest to the administrator *as assignee* in law: and in the proviso assignee is mentioned, but that is to the assignees of the survivor of them; so that the assignee in law of the husband cannot claim it, for he did not survive, but the wife. And the wife can take no advantage of the condition, because she is a stranger to the estate and to the deed, seeing she did not enseal the deed; and if the condition should go to the wife, yet she cannot enter for the condition, but only the administrator of the husband, who hath not any title of entry; and the defendant claims by him. Wherefore it was adjudged for the plaintiff.—Upon this judgment a writ of error was forthwith brought, returnable in the exchequer chamber; and the judgment was there affirmed in *Michaelmas Term*, in the tenth year of *Charles* the first.

2. Co. 35. b. 12. Co. 35. Latch. 274. 1. Mod. 216.

Hilary

Hilary Term,

8. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt.* *Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

William Noy, *Eſq.* *Attorney General.*
Sir Richard Sheldon, *Knt.* *Solicitor General.*

Carlion *againſt* Mill.

CASE 1.

Hilary Term, 7. Car. 1. Roll 1147.

An action on *the caſe* lies againſt the *apparitor* of a biſhop for maliciouſly cauſing a man to be cited to the conſiſtory court upon a groundleſs ſuſpicion of incontinency.

ACTION ON THE CASE; for that the defendant, being an *apparitor* under the biſhop of *Exeter*, maliciouſly, and without colour or cauſe of ſuſpicion of incontinency, of his own proper malice procured the plaintiff *ex officio* (*a*), upon pretence of fame of incontinency with one *Editha*, whereas there was no ſuch fame or juſt cauſe of ſuſpicion, to be cited to the conſiſtory court of *Exeter*, and there to be at great charges and vexation, until he was cleared by ſentence, which was to his great diſcredit and cauſe of great expences and loſſes. Upon not guilty pleaded, it was found for the plaintiff.

ASHLEY, *Serjeant*, moved in arreſt of judgment, that in this caſe an action lies not; for he did nothing but as an informer, and by virtue of his office.

But ALL THE COURT, *abſente* RICHARDSON, held, that the action well lies; for it is alledged, that he *falsò et malitiosè* cauſed him to be cited, upon pretence of fame, where there was no offence committed: and avers, that there was not any ſuch fame, ſo as he did it maliciouſly, and of his own head, and cauſed him to be unjuſtly vexed, which was to raiſe gain to himſelf: whereupon they conceived, he being found guilty for it, the action well lies; and therefore rule was given to enter judgment for the plaintiff, unleſs other cauſe was ſhewn.—And upon a ſecond motion, RICHARDSON, *Chief Juſtice*, being preſent, judgment was given for the plaintiff.

Ante, 285.
5 C. Jones, 305. 312.
1. Roll. Ab. 93. 102.
Cro. Jac. 351. 356.
Cro. Eliz. 714.
Lutw. 67.
1. Sid. 460. 463.
1. Lev. 92. 292.
Skin. 131.
1. Com. Dig. 164.
2. Mod. 52.
1. Vent. 86.
1. Bac. Ab. 58.

Dougl. 629. 1. Term Rep. 493. 4. Term Rep. 247.

(*a*) See 13. Car. 2. *c.* 12.

Hopeſtill Tyndal's Caſe.

CASE 2.

Ante, Page 264.

Certiorari from the king's bench to remove an indictment of felony from one of the *Cinque Ports*, muſt be directed to the *mayor and jurats*, and not to the *lord warden*.

NOTE, That the firſt day of this Term *Hopeſtill Tyndal* was arraigned at the bar for buggery, ſuppoſed to be committed at *Hithe*, being one of the *Cinque Ports*, he being indicted there, and the record removed hither by *certiorari* directed to "The Mayor "and Jurats" of the ſaid vill, and not to "The Lord Warden of "the *Cinque Ports*."

See ante, 252. 264. 2. Hawk. P. C. 400. 3. Term Rep. 658.

A challenge not heard till the juror was ſworn and marked,

The priſoner challenged one of the jurors, being the foreman, who was ſworn, and marked ſworn by the clerk, before the challenge was heard by the Court; and therefore without the aſſent of the

cannot be admitted without the conſent of the attorney general. See Poſt. 347.

attorney

TILDEN'S CASE.

attorney general, then preſent, they would not alter the record; and becauſe he would not aſſent to alter the record, the challenge was diſallowed.

And afterwards, upon evidence at the bar, divers witneſſes were produced by the defendant, which were heard without oath (a); but ſome of them witneſſing matter which the attorney general conceived would make for the king, were upon the deſire of the ſaid attorney ſworn, and after ordered upon their ſaid oath to deliver their knowledge.

(a) By 1. Ann. c. 9. witneſſes in behalf of a priſoner ſhall not be ſworn. 2. Bulſt. 147. 2. Hawk. ch. 46. ſ. 29. and the caſes there cited. 4. Bl. Com. 353.

Qu. If a priſoner acquitted of felony can be bound to his good behaviour. Cro. Jac. 507. 2. St. Tr. 60. 2. Hawk. P. C. 613. 627.

The priſoner was afterward acquitted: but becauſe the evidence (if it had been believed by the jury) was very ſtrong againſt the priſoner, RICHARDSON, *Chief Juſtice*, and JONES appointed, that the priſoner ſhould be bound to his good behaviour; whereupon, againſt the opinion of MYSELF and JUSTICE BERKLEY, he was ſo bound.

CASE 3.

Roſe *againſt* Bartlett.

Trinity Term, 7. *Car.* 1. *Roll* 497.

If an adminiſtratrix marry, and the huſband grant "*all* his "goods and "chattels," and expreſſes in the deed that he has given a horſe in the name of ſeiſin of the goods, which horſe is parcel of the goods of the inteſtate; the goods of the inteſtate will paſs by this grant. *Sed quære.* 21. *Hen.* 7. 29. 2. Roll. Ab. 58.

EJECTMENT on the demiſe of *John Roſe* and *Elizabeth* his wife of forty acres of land and two acres of meadow, in *Burnham*, for three years. Upon not guilty, a ſpecial verdict was found, that *Philip Scudamore* was ſeiſed in fee of the land in the declaration, 44. *Eliz.* and by indenture demiſed it, by the name of four cloſes of paſture in *Burnham*, for a hundred years to *Richard Batyne*; and that *Richard Batyne* entered and was poſſeſſed: and being ſo poſſeſſed, and ſeiſed in fee of other lands and tenements in *Burnham*, afterwards, *viz.* 12. *April*, 3. *Car.* 1. made his will in writing, which is found *in hæc verba*: "I will, that my wife "*Elizabeth* ſhall have *Burnhams* and the lands thereunto belong- "ing, being three half acres in *Lentfield*: and my will is, if ſhe do "marry, my ſon *Nicholas* ſhall have *Burnhams*, and three half "acres lying in *Lentfield*. ITEM, I will, my ſon *Bartholomew* "ſhall have for his maintenance out of the lands five pounds yearly "as long as ſhe keepeth herſelf unmarried. ITEM, I will and be- "queath to my ſaid wife *Elizabeth* all the reſt of my lands lying "in the pariſhes of *Burnham* and *Hitchman* during the time of her "life, and afterwards to my ſon *Bartholomew*. ALSO, I make my "wife my full and whole executrix of all my cattle, corn, and move- "able goods, except ſuch as I have appointed to be ſold for pay- "ment of legacies," *prout per le volunt, &c.*—They find that *Richard Batyne* died, and the ſaid *Elizabeth* proved the will in the prerogative court, *quodque adminiſtratio omnium bonorum jurium ac creditorum dictum* RICHARDUM BATYNE *et ejus teſtamentum quotiescunque concernent.* by the judge of the prerogative court was committed to the ſaid *Elizabeth*: that ſhe afterward took to huſband the defendant, whereby they were poſſeſſed of the ſaid leaſe; and that the ſaid *Bartlett* aſſigned that leaſe to *Richard Hammond* upon the condition for the payment of thirty pounds at a day certain, who, failing of the payment thereof, re-aſſigned afterwards that leaſe to the defendant: that the ſaid *Elizabeth* died; and afterwards the ſaid *Bartholomew* died; and that *Elizabeth* the wife of *Bartholomew* obtained letters of adminiſtration *de bonis*

bonis RICHARDI BATYNE *non administrat.* by *Elizabeth* the wife of *Richard Batyne*, who took *John Rose* to husband, and they let to the plaintiff, and the defendant *ousted* him; and if, &c.

ROSE *against* BARTLETT.

This Case was argued by CALTHROP *for the plaintiff*, and by GERMYN *for the defendant*.

If a man hath fee-simple lands and lands for years, the lease will not pass by a devise of "all my lands "and tene-"ments;" *sed aliter* if he hath no fee.

2. Vern. 250. 1. Peere Wms. 186. 2. Peere Wms. 457. 3. Peere Wms. 26. 2. Atk. 450. Cas. Temp. Talb. 179. Term Rep. C. B. 16. See also 1. Brown's Rep. Ch. 79. Vezey, 271. Cowp. 43. 299. 657. 2. Term Rep. 105.

THE FIRST QUESTION was, Whether this lease for years be devised to *Elizabeth* for life, remainder to *Bartholomew*?—And ALL THE JUSTICES, *absente* RICHARDSON, resolved, that if a man hath lands in fee and lands for years, and deviseth *all his lands* and tenements, the fee-simple lands pass only, and not the lease for years; and if a man hath a lease for years and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth, for otherwise the will should be merely void.

An executor must give special assent to the devise of a term to him for life with a remainder over. 8. Co. 94. b. Cowp. 293.

SECONDLY, They all agreed, that if one deviseth his land which he hath by lease to his executor for life, the remainder over, that there ought to be a special assent thereto by the executor, as to a legacy, otherwise it is not executed; and there was not here any special assent.

Devise of lands for life shall not extend to a lease of lands, if he had other lands than the leasehold in the same place. 2. Ands. 123. 1. Vezey, 272. 2. Bl. Rep. 728. 1303. Cowp. 306. 2. Ter. Rep. 105.

THIRDLY, JONES, *Justice*, and MYSELF, were of opinion, that it appears here that he had other lands in fee which he devised to his wife *durante viduitate*, and other lands which he devised to her for life, the remainder over; and then that devise may not extend to that lease. But BERKLEY, *Justice*, to the contrary; because it may be, that land devised as long as she is unmarried, is the sole land which he had in fee, and the other land devised absolutely is the lease for years. But it was thereto answered, that the devise is to her for life of the lands in *Burnham* and *Hitcham*, and clearly no part of the lease-land extends into *Hitcham*; so as it is clear it extends not to lease-lands, but to freehold lands.

A testator may appoint seperate executors of distinct parts of his property. 19 *Hen.* 8. *pl.* 8. Dyer, 3. Bro. Ex. 155. Moor, 12. 1. Roll Abr. 914. B. 613.

FOURTHLY, *Richard Batyne* making his wife his sole and whole executrix of all his cattle, corn, and moveable goods, and not mentioning what shall be done concerning the residue of his estate, Whether the wife be absolute executrix *quoad* all his estate, or only particular executrix *quoad* his cattle, corn, and moveable goods, and not *quoad* his leases and his debts?—And as touching that point we all agreed, that one may make several executors, the one *quoad* things real, the other *quoad* things personal, and may divide their authority, yet *quoad* creditors they are all executors and as one executor, and may be sued as one executor. 19. *Hen.* 8. *pl.* 8. *Dyer, fol.* 3. 32. *Hen.* 8. *Br.* "*Exec.*" 155. But JONES, *Justice*, and MYSELF, conceived, as this Case is, that she is sole and absolute executrix for the whole estate, as well leases as debts and other things; for when he saith, that she shall be his sole and whole executrix of his cattle, corn, and moveable goods, it is but an enumeration of the particulars, and no exclusion of any, especially when he doth not make any other executor for the residue; and *catalla* in *Latin* extends to all things. And it may be intended that so was his intent, when he made not any other executor.

Rose *against* Bartlett.

But Berkley, *Juſtice*, conceived, that ſhe is a ſpecial executrix *quoad* the things enumerated, and no general executrix.

If adminiſtration be granted "*omnium bonorum et creditorum concernentium teſtamentum*, &c." it will be a general adminiſtration, though only ſome particulars are mentioned in the will.

Cro. Jac. 394. 1. Sid. 100. 1. Salk. 36. 1. Com. Dig. 263. Dougl. 542.

The Fifth Question was, Admitting that ſhe is no abſolute executrix as to all the eſtate, but as to the particulars ſpecially named, and ſhe proving the will, and it being found that adminiſtration was committed to her "*omnium bonorum jurium ac creditorum dictum* Richardum Batyne *et ejus teſtamentum qualitercunque concernent.*" Whether that be a general adminiſtration committed, or only an adminiſtration of the goods whereof ſhe was made executrix?—Berkley, *Juſtice*, held, that it is but a ſpecial adminiſtration, becauſe it is "*bonorum jurium et creditorum prædict.* Rich. Batyne *et prædict. teſtament. concernent.*" and that coupled to the teſtament, ſo that it extends no further than the will. But Jones and Myself were of opinion, that it was a general adminiſtration committed; for *jurium et creditorum* are general words, and the word "*et*" ſhould be expounded as "*aut*," and it cannot be tied only to the teſtament; for there are not any words of debts, as "*creditorum*" imports, and they are as general words as are uſual in general letters of adminiſtration. Wherefore, upon all the matter, Jones, *Juſtice*, and Myself, were of opinion againſt the plaintiff, that he ſhould be barred. But Berkley, *Juſtice*, *è contra*; *per quod adjournatur.*

Case 4.

Sir Thomas Fynch *againſt* Lambe.

Michaelmas Term, 5. *Car.* 1. *Roll* 295.

To *non aſſumpſit infra ſex annos*, on a promiſe to pay 500l. at *A.* a replication that the plaintiff within the time ſued an original on which the defendant was outlawed, that the outlawry was declared void, and that within a year after he brought another action for 600l. in a different county, is good, notwithſtanding the variance, if it be averred for the ſame cauſe.

Ante, 160. 280. Jones, 312. Co. Lit. 282. Stiles, 442. 1. Lut. 297. 1. Lev. 11. 3. Lev. 245. Carth. 136. 294. 12. Mod. 140. 1. Sid. 53. 1. Com. Dig. 155. 3. Bac. Abr. 509. 516.

Error of a judgment in the common pleas in an *aſſumpſit*; ſuppoſing that the defendant, 16. *Jac.* 1. at *Bury* in *Suffolk*, promiſed to pay, &c.

After verdict and judgment upon *non aſſumpſit* pleaded, and found for the plaintiff, the defendant brings error, and upon *diminution* alledged the original was certified to be in *Hilary Term*, 4. *Car.* 1. upon which the plaintiff in the writ of error pleads the ſtatute of 21. *Jac.* 1. of Limitations; and that this action, being upon a promiſe in 16. *Jac.* 1. and not brought within ſix years after the promiſe, nor within three years after the ſtatute, is not maintainable.

The defendant pleads, that he 2. *Car.* 1. which was within three years of the ſtatute, brought a writ original of *aſſumpſit* ſuppoſed to be made in *Kent* againſt the defendant, now plaintiff in the writ of error, wherein he was outlawed; but in 3. *Car.* 1. the outlawry in the common pleas was declared void and he diſcharged; and that within a year after he brought this action, and ſuppoſeth the promiſe to be made at *Bury* to his damages of ſix hundred pounds, and that in the former action the *aſſumpſit* was alledged to be made in *Kent* to his damage of five hundred pounds; and he avers that it was one and the ſame promiſe and cauſe of action.

Upon this plea the plaintiff in the writ of error demurred.

Twisden ſhewed the cauſe to be, for that this new action varies in the county from the *aſſumpſit* and in the damages alledged, and ſo cannot be intended one and the ſame cauſe of action, nor to be a new ſuit begun for the ſame matter.

Alſo

Also *I* conceived, that forasmuch as this outlawry was not reversed by error, but avoided by plea, the first original is not determined, but he might have proceeded thereupon; and then to begin a new original, and in another county, is not according to the 21. *Jac.* 1. c. 16. nor within the intent of the statute. SIR THOMAS FYNCH *against* LAMBE. Salk. 424. Strange, 719. Ld. Raym. 1427. 1441. 1. Wilf. 167. 3. Term Rep. 663.

But RICHARDSON, JONES, and BERKLEY, held, that this variance of the county and damages is not material to the action, being transitory, and averred to be for one and the same cause; and although the outlawry is not reversed by a writ of error, but avowed by plea, it is all one within the intent of the statute, for the statute is not where the outlawry is reversed by error, but where the outlawry is reversed, so it is by any means. Therefore, upon their three opinions, a rule was given, that judgment should be affirmed.

Eyres *against* Taunton. CASE 5.

Trinity Term, 7. Car. 1. Roll 590.

SCIRE FACIAS, in *chancery*, upon a recognizance of two hundred pounds by one *Cawley*, who was returned dead; whereupon a second *scire facias* issued against the heir of *Cawley*, and against the tenants of the lands and tenements of *Cawley* which he had *tempore recognitionis vel postea*; whereupon the sheriff returned the defendant *Taunton* TERRE-TENANT of such lands, and omitted to return any thing concerning the heir. Upon this the defendant pleads, that the said *Cawley* had nothing in the said lands at the time of the said recognizance, or ever after: and upon this they were at issue in chancery, and it was sent hither to be tried; and it was tried, and found for the plaintiff, that *Cawley* was seised, &c. A return upon a *scire facias* against an *heir* and *terre-tenant* is bad, if it say nothing as to the *heir*. *Sed qu.* if it is not aided by appearance? Post. 313. Jones, 319. Cro. Eliz. 856. 2. Roll. Abr. 461. 1. Brownl. 37. Kit. 279. 2. Bac. Abr. 208.

After verdict for the plaintiff, MALLET, for the defendant, moved in arrest of judgment, because nothing was returned concerning the heir, *viz.* that there was not any heir, or that the heir had nothing; therefore no judgment shall be given; for it is a non-return of the sheriff, and not a mis-return; and it is not aided by the 32. *Hen.* 8. c. 30. or 18. *Eliz.* c. 14. or 21. *Jac.* 1. c. 13. or any of the statutes of *Jeofails*. The reason he alledged that no judgment ought to be given, was, because the *terre-tenant*, without the heir, was not to be charged, and therefore the heir ought to be summoned; and until the heir be summoned, or that it be returned that there is not any heir to be summoned, or that the heir hath not any lands to be charged, the *terre-tenant* ought not to be charged; for the heir might have a release to plead, or other matter to bar the execution, and his land is rather to be charged than the land of the *terre-tenant*, for the heir shall not have contribution against the *terre-tenant* as the *terre-tenant* shall have. Also, if the heir be within age, *the parol shall demur*, and the *terre-tenant* shall have advantage thereof; and therefore, there being nothing returned concerning him, he moved, that no judgment ought to be given. 3. Co. 13. a. 2. Inst. 396.

RICHARDSON, *Chief Justice*, JONES, and BERKLEY, *Justices*, held, that the return was not good, because the plaintiff names and sets forth that there is an heir, and there is no return *quoad*

EVERE *against* TAUNTON.

the heir, ſo as to him it is *quaſi breve album*, and no return, and is not aided by any ſtatutes.

But *I* was of a contrary opinion, becauſe the defendant hath omitted to take advantage thereof; for having pleaded, and the iſſue being found againſt him, he ſhall not now take advantage for not returning the heir to be ſummoned, for it may be that there is not any heir, or that the heir hath no land, or may not be found. *Vide* 17. *Edw.* 2. "*Execut.*" 139. *b.* 18. *Edw.* 2. *ibid.* 142. that the *terre-tenant* in a *ſcire facias* ſhall not be warned until it be returned that there be not any heir, or that the heir is warned and comes not in. *Vide* 3. *Hen.* 4. 10. a *ſcire facias hæredi et terre-tenenti.* The ſheriff returns ſuch a *terre-tenant* warned, and ſpeaks nothing of the heir, yet the *terre-tenant* was inforced to anſwer. And after, *ad informandam Curiam* whether there was an heir, it was ordered, that a new *ſcire facias* ſhould be awarded (*a*).

Cro. Eliz. 896.

(*a*) The principal caſe was moved again in *Hilary Term*, and judgment given for the plaintiff. Poſt. 312.

On judgment againſt a perſon as an heir and terre-tenant in "*riens per deſcent*," execution ſhall be only of a *moiety* of the land. 34 H. 8. 5. Com. Dig. 347.

THE CASE of *Bowyer v. Rivett* (*b*) was cited by JUSTICE JONES, that in a *ſcire facias* againſt the heir and *terre-tenant* he is charged only as *terre-tenant*; and by pleading "*riens per deſcent*," and found againſt him, the execution was of the moiety of his land, and not of all (*c*), as the heir ſhould have been charged upon a falſe plea.

Poſt. 313.—Benl. 162. Jones, 87. Poph. 153. 3. Bul. 317. Carth. 93. Dyer, 347. Ambler, 15. 17. (*b*) *Hilary Term*, 3. *Car.* 1. Bend. 162. Jones, 87.

(*c*) By 29. Car. 2. c. 3. a truſt in fee ſimple, and an eſtate *pur autre vie* which comes to an heir as ſpecial occupant, ſhall be aſſets in his hands, but he ſhall not be chargeable, in conſequence, to pay out of his own eſtate. And by 3. and 4. Will. & Mary, c. 14. if a defendant pleads "*riens pur diſcent*" the day the writ was filed, the plaintiff may reply "*aſſets before the original*," and the jury ſhall enquire of the lands, &c.

Spurſtow

Spurſtow *againſt* Prince.

Case 6.

An executor or adminiſtrator may maintain an action on the caſe againſt a ſheriff for not returning a *fieri facias* on account of his teſtator.

ACTION on the caſe, by an executor againſt the ſheriff; for that the teſtator upon recovery had a *fieri facias*, and the defendant made execution and levied the debt, and at the return of the writ did not return it; and afterwards the teſtator died; whereupon the plaintiff, for that TORT *in vitâ teſtatoris*, and for the loſs which came to him, brought this action. Upon not guilty pleaded, it was found for the plaintiff.

GLYNN moved in arreſt of judgment, that this action is not maintainable by an executor, becauſe it is a *perſonal wrong* done to the teſtator, for which the executor hath no remedy; for he hath not any remedy by the courſe of the common law for ſuch perſonal wrongs; and it is not maintainable by the equity of the 4. *Edw.* 3. c. . *de bonis teſtatoris aſportatis:* and for that purpoſe he cited a caſe in this court of *Levaſton v. Diſkins* (*a*), which JONES, *Juſtice*, ſaid he well remembered, where an action on the caſe was brought by an executor againſt a ſheriff for ſuffering an eſcape on meſne proceſs, in the time and at the ſuit of the teſtator; and becauſe it was a *perſonal wrong* to the teſtator, the action lay not for the executor (*b*). BUT NOTE, no judgment was given there, for the COURT was divided therein.—THE COURT thereupon would adviſe until the next *Term*.

Latch. 167. 1. Roll. Ab. 913. Jones, 173. R. 205. Comb. 430. Salk. 12. Ld. Raym. 40. 4. Mod. 403. See 1. Com Dig. "Adminiſtration." (B. 13.) 2. Bac. Ab. 445. Cowp. 403.

(*a*) 3. Car. 1. (*b*) See Hambly *v.* Trott, Cowp. 371.

Luttrell *againſt* Lea.

Case 7.

On "*nul tiel record*" pleaded to an action of *debt* in C. B. on a judgment in B. R. the record may be removed by *certiorari*.

DEBT in the common pleas, upon a judgment in this court. The defendant pleaded "*nul tiel record*;" and upon that the plaintiff there obtained a *certiorari* out of the chancery to ſend the record thither, which by *mittimus* might be ſent into the common pleas. And it was much doubted whether ſuch *certiorari* were allowable, becauſe that records in the king's bench ſhall not be removed out of that court into any other court, for that the pleas here are *coram rege*. And divers precedents were ſhewn, that ſuch records were by *mittimus* out of the chancery ſent into the common pleas, *viz.* in *Hilary Term*, 21. *Eliz. Roll* 1374. in debt upon a judgment in this court, upon "*nul tiel record*" pleaded by *mittimus* out of the chancery, it was ſent into the common pleas, and judgment for the plaintiff. In *Michaelmas Term*, 23. & 24. *Eliz. Roll* 2013. *Leex v. Scargill* was ſuch a precedent. In *Hilary Term*, 11. *Jac.* 1. *Roll* 3455. *Palmer v. Steward*, debt upon a bond to the ſheriff for appearance, he pleads, *comparuit ad diem*; the plaintiff denies it, and, by *mittimus* out of the chancery, it was brought into the common pleas, and judgment there was given. In *Hilary Term*, 11. *Jac.* 1. *Roll* 1715. *Fylipps v. Mannings*, ſuch plea and judgment, and divers other precedents were ſhewn; wherefore it ſeemeth that ſuch courſe is well allowable. *Sed adjournatur.*

4. Inſt. 73. 1. Roll. Ab 394. Dyer, 22. b. 187. 1. Lev. 223. 1. Sid. 329. Hob. 135. 2. Com. Dig. 17. 2. Aik. 317. 1. Saund. 97. 99. 2. Hawk. P. C. 9.

9. Car. 1. In the King's Bench.

Sir Thomas Richardson, *Knt. Chief Justice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Justices.*

William Noy, *Esq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Symms *against* Lady Smith. CASE 1.

Hilary Term, 6. Car. 1. Roll 1066.

COVENANT; for that the defendant had covenanted that she would make a lawful surrender of such copyhold land, upon reasonable request, and that she would permit the plaintiff to enjoy the said lands, and to receive the rents quietly, without interruption. And the plaintiff shews, that she was a copyholder of such lands, and alledges the custom, that she might surrender by letter of attorney into the hands of two tenants out of court: and shews, that he caused a letter of attorney to be made for the said *Lady Smith* to seal, to give authority to such two persons named therein to surrender at the next court, and tendered it to her to seal; and she would not seal it, nor surrender at the next court, holden such a day, and that she received the rents of the said lands for such a time, and so brake her covenant by not surrendering upon that request.

A covenant to surrender a copyhold upon *request* is not broken by refusing to execute a *letter of attorney* to make such surrender. Ante, 176. Godb. 445. 1. Roll. Abr. 442. 457. Jones, 314. Styles, 107. 2. Mod. 62. 9. Co. 76. 2. Com. Dig. 495. 2. Term Rep. 484.

The defendant pleads, that the plaintiff tendered to her a letter of attorney to seal; and because she did not know what was therein contained, she required reasonable time to be advised by her counsel thereupon: and the plaintiff refused to give her any time to be advised thereon; for which cause she did not seal it.

The plaintiff, upon this plea, demurs. And being argued at the bar by BAALL, *for the plaintiff*, and by BEARE, *for the defendant*,

THE COURT resolved, FIRST, That the breach is not well assigned; for she is by her covenant to make surrender upon request, but is not bound to make a letter of attorney to make a surrender; so the breach is not assigned according to the covenant.

SECONDLY, It was moved, that forasmuch as she is to make a surrender upon reasonable request, admitting that she ought to make a letter of attorney, he should have reasonable time to be advised after request; for there is difference where she is to make it upon request: for there she ought to have done it presently upon the request, and shall have no time to advise with counsel; but where she is to do it upon reasonable request, she shall have convenient time to advise thereof.—But ALL THE COURT held, that there was not any difference, where it is to be done upon request, or upon reasonable request.

There is no difference between an act to be done *upon request* and upon *reasonable request*. 1. Roll. Ab. 442. 2. Co. 3. b.

A request to make a power of attorney to surrender, is not a request to make a surrender.
1. Roll. Ab. 467.

THIRDLY, It was moved, that it is a breach of the covenant, because she did not surrender at the next court; and that a request to make a letter of attorney to surrender, implies a request to make a surrender.—*Sed non allocatur:* for it ought to be an express request to make a surrender, and not an implied one. Wherefore it was ruled, that judgment should be entered for the defendant, unless, &c.

CASE 2.

Lancaster *against* Keyleigh and Steymson and Steymson his Bail.

Q. If bail may have a writ of error on a judgment in *scire facias* by 27. *Eliz.* c. 5.; but if they may, the principal and bail cannot join; for the judgments against them are several. Ante, 142. 286. Post. 408. 464. 575.

Godb. 440. 1. Jones, 325. 360. Cro. Jac. 771. 384. Hob. 78. Yelv. 157. 1. Roll. 294. 2. Saund. 116. 2. Wilf. 414. 5. Mod. 230. 1. Salk. 263. Andrews, 287.

ACTION ON THE CASE. The plaintiff recovers against *Keyleigh* one hundred and thirty pounds damages in the king's bench, to which action the said *Steymson* and *Steymson* were bail: and the judgment being against the principal, and after (upon a *scire facias*) against the bail, error was brought by the principal and the bail in one writ of error, returnable in the exchequer chamber, supposing the error to be "*in redditione judicii et in adjudicatione executionis ad damnum ipsorum*," &c.

SIR JOHN BANKS hereupon moved, that this record might not be removed upon this writ of error; for the bail may not have a writ of error in the exchequer chamber by the statute of 27. *Eliz.* c. 5. which gives this writ only in the seven cases mentioned therein, and in no other; for it being a new law which gives authority only to that court, may not be extended larger than the statute limits.

SECONDLY, Though the bail may have a writ of error, yet one writ of error lieth not jointly for the principal and the bail, because there are several judgments given against them: and the damages against the one is not against the other; wherefore they may not join in a writ of error no more than tenant for life and he in reversion; or the tenant and vouchee may join.

ALL THE COURT was of this opinion.

5. Com. Dig. 288. 291. 1. Bac. Abr. 217, 218. 2. Bac. Abr. 212.

CASE 3.

Pruett *against* Drake and his Wife.

Easter Term, 8. *Car.* 1. *Roll* 271.

Dower does not lie for a common in gross. After verdict "*communia*" "*pasturæ*" shall not be intended *divided common*; but a common *appendant* or *appurtenant*, of which a wife is dowable without demand.
S.C. Jones, 375. S.C. 1. Roll. Abr. 675.

ERROR of a judgment in the common pleas in DOWER. The error assigned was, Because the writ and declaration made demand of dower in A MESSUAGE, 160 *acras terræ*, 60 *prati*, 100 *pasturæ*, *et de communia pastur. pro omnibus averiis, rum pertinentiis*, &c. The tenant pleads, *ne unques seisie quod dower*, &c.; and found for the demandant, and damages assessed, and judgment.

Whereas, of *common in gross without number*, a wife is not dowable; and the damages being entirely given, and judgment accordingly, it was therefore moved by CALTHROP to be error.

ROLLE, *for the defendant* in the writ of error, agreed, that of *common in gross without number* a wife is not dowable: but he conceived, it shall not be here intended to be common *in gross*, but rather *appendant* or *appurtenant*. And although it was said, if it

1. Roll. 197. Co. Lit. 30. b. 32. a. note (6). Godb. 21.

were

were common *appendant* or *appurtenant*, it need not be demanded, but is included in the land, *cum pertinentiis*, and that it is now *bis petitum*, yet that is no cauſe of abatement of the writ; for if he had pleaded in abatement for that cauſe, it ſhould not prejudice the defendant, for ſhe might have abridged her *plaint*; and after judgment it is no cauſe to reverſe it. And precedents were ſhewn in the common pleas in *Eaſter Term*, 4. *Car.* 1. *Roll* 1066. *Peckham v. Wickham*, where in dower the demand was in the ſame manner of lands and common; and upon pleading, demurrer being for part, and a verdict for part, judgment was for the defendant.

Priority againſt Drake and his Wife.

And now being debated, ALL THE COURT *ſeriatim* delivered their opinion, that as the caſe is, the common may be intended *appendant* or *appurtenant*, whereof dower is demandable; and it ſhall not be intended to be *common in groſs without number*, whereof a *feme* is not dowable; and the rather, being after verdict, which finds, that he was ſeiſed *quad dower*, &c. And by intendment it appeared upon the evidence, that it was ſuch a common as went with the land whereof ſhe was dowable: and if it had been *common in groſs without number*, the judge before whom the trial paſſed would have directed it to be found againſt the defendant; and therefore (it being alſo in caſe of dower, and to affirm a judgment) the moſt favourable conſtruction ſhall be made: and although the words are, "*et de communia paſturæ*, &c." yet it ſhall not be intended divided common, but rather an enumeration of the things demanded: and the other judgment being in the ſame manner upon a demurrer, they all agreed, that it was no error; and therefore the judgment was affirmed.

Dower will not lie for a tenement.

Savage, Eagg.

Baldwin *againſt* Wine.

CASE 4.

Hilary Term, 8. *Car.* 1. *Roll* 181.

EJECTMENT on a leaſe of tithes in *Roughton*, made by *Charles Baldwin*, as appertaining to ſuch a chapel. The ejectment ſuppoſed in taking of ſo many loads of tithes of wheat and barley, being ſevered from the nine parts. Upon not guilty pleaded, it was found for the plaintiff.

An ejectment will lie on a leaſe for tithes.

S.C. Jones, 322. 15. *Hen.* 7. *pl.* 8. Co. Lit. 159. 11. Co. 25. b. 1. Roll. Rep. 88. Dyer, 84. 356. Latch. 62. Ld. Raym. 136. 789. Carth. 390. 3. Black. Com. 206. Dougl. 305.

GRIMSTON now moved in arreſt of judgment, that an *ejectment* lies not of tithes only; but it may be of a rectory, or of ſuch a chapel, and of the tithes thereto appertaining, ſo as he may be ejected of or from a thing in poſſeſſion, whereof an *habere facias poſſeſſionem* may be, but not of tithes only.

THE COURT would adviſe. But it being afterwards moved again, it was adjudged for the plaintiff (*a*).

1. Com. Dig. 287. 3. Com. Dig. 113.

(*a*) See 27. Hen. 8. c. 23. 32. Hen. 8. c. 7. 2. & 3. Edw. 6. c. 13.

Barnaby *againſt* Rigalt.

CASE 5.

Michaelmas Term, 8. *Car.* 1. *Roll* 364.

ERROR of a judgment in the common pleas in an action of the caſe upon an *aſſumpſit*; and declares upon the cuſtom of merchants, whereby if one for wares delivered to him or his factor make a bill of exchange, directed to a merchant, and the merchant promiſe to pay it; and the Court will intend the parties to be within

The acceptance of a bill of exchange amounts, by the cuſtom of merchants, to a the cuſtom.

BARNABY *against* RIGALT.

2. Roll. Ab. 6. Cro. Jac. 306. Carth. 3. 510. Comb. 190. Co. Lit. 182. Salk. 125. 3. Mod. 226. 5. Mod. 367. 10. Mod. 287. Ld. Ray. 175. Cowp. 572.

to whom it is directed accept thereof, and after refuse to pay, and this is *protested* before a public notary (*a*), that then he who delivered the bill is bound to pay it: and alledges in fact, that the said *Rigalt* delivered in *France* such wines of the value of 200l. to *John Stile*, factor of the said *Barnaby*, and he thereupon delivered a bill of exchange for the said money to *J. N.* who accepted thereof, and had not paid it; whereupon he brought his action. The defendant pleaded *non assumpsit*; and found against him, and judgment for the plaintiff.

And error was assigned, Because the action is grounded upon the custom of merchants, and doth not shew that the plaintiff was a merchant at the time of the delivery of the bill of exchange.

But because he was named to be a merchant in the declaration, and the bill is for merchandize sold, THE COURT would not intend but that he was a merchant at that time, &c. Wherefore the judgment was affirmed.

(*a*) See 9. & 10. Will. 3. c. 17. and 3. & 4. Ann. c. 9.

CASE 6.

Blunden *against* Baugh.

Hilary Term, 7. Car. 1. Roll 1106.

A being seised of an estate in fee, permits his son to enter into the lands and to occupy them as a tenant at will; the son afterwards leases the lands by indenture for twenty-one years, rendering rent; the father may at his option construe this demise to be a *disseisin* or *not a disseisin*.

S.C. Jones, 135. Latch. 53. 2. Roll. Ab. 661. Co. Lit. 57. a. note (3). 151. b. 271. a. note (2). 323. a. 5. Com. Dig. 478. Palmer, 201. Powel on Cont. 80. 1. Burr. 60. 79. 111. 5. Burr. 2830.

ERROR of a judgment in the common pleas. *Baugh* brought an ejectment of lands in *Blechingley* of the demise of *Charles Earl of Nottingham* against *Blunden*. Upon not guilty pleaded, a special verdict was found, that 39. *Eliz.* CHARLES LORD HOWARD, *Lord Admiral*, being seised of the said land in tail, by indenture covenanted, in consideration of marriage betwixt *Sir William Howard* his eldest son and heir and *Elizabeth* daughter and heir of *Lord St. John*, to suffer a recovery of those lands to the use of the said *William* and *Elizabeth*, and the heirs males of the body of the said *William*, with divers remainders over: that the marriage took effect, and the said *William* entered by the assent of his father and occupied at his will; and in 4. *Jac.* 1. by indenture demised that land to *Thomas Humphrys* and *John Humphrys* for twenty-one years, rendering 115l. rent: they enter, and were possessed *prout lex postulat*: and being so possessed, the said *Charles*, THEN *Earl of Nottingham*, and the said *William*, THEN *Lord Effingham*, by indenture covenanted with *Sir Robert Dormer* and Others (for that the said indenture of 39. *Eliz.* was not executed for the performance of the assurances and uses comprised therein) to levy a fine of those lands to the use of the said *William Lord Effingham* and *Elizabeth*, for a jointure for the said *Elizabeth*, and to the heirs males of the body of the said *William*, the remainder over as in the indenture, &c.; which fine was levied accordingly, and to the uses in the said indenture mentioned: that in 9. *Jac.* 1. the said *William Lord Effingham* died without issue male of his body; and *John Humphrys* died: and in 14. *Jac.* 1. *Thomas Humphrys* being seised or possessed

Cowp. 693. 701.

prout

prout lex postulat, by indenture inrolled within six months, in consideration of a competent sum of money, bargained and sold the said lands to *Charles Lord Effingham*, son and heir apparent to the earl, and his heirs. *Charles Earl of Nottingham* dies; *Charles*, NOW *Earl of Nottingham*, being his son and heir, entered. *Blunden*, the defendant, by the command of the said *Elizabeth*, entered and claimed it as her jointure. And *Charles*, NOW *Earl of Nottingham*, son and heir of the said *Charles Earl of Nottingham* the Lord Admiral, entered, and made a lease for three years to the plaintiff, who entered; and the defendant, as servant of the said *Elizabeth*, and by her command, OUSTED him. And if *super totam materiam* the Court should adjudge for the plaintiff, they found for the plaintiff; if otherwise, for the defendant; and they found the said *Elizabeth* to be yet alive. BLUNDEN against BAKER.

After arguments at the bar in the common pleas and at the bench, it was, by the opinion of RICHARDSON, *Chief Justice*, HUTTON, and VERNON, adjudged for the plaintiff, against the opinion of HARVEY, *Justice*, who argued strongly for the defendant. And hereupon a writ of error was brought, and the error assigned only in the matter of law. And it was divers times very well argued at the bar by LITTLETON, *Recorder of London*, and SERJEANT BRAMPSTON, *for the defendant* in the writ of error, and by CALTHROP and SERJEANT HENDEN, *for the plaintiff*; and afterward by all the Justices of the king's bench *seriatim*.

And JONES, BERKLEY, and MYSELF held, that the judgment was erroneous. The main question was, Whether by any of these acts there was a *disseisin* committed to *Charles Earl of Nottingham nolens volens*; and if there be a *disseisin*, who should be the *disseisor* and tenant to the freehold? And to the first, JONES, BERKLEY, and MYSELF held, that the law will not impute nor construe it to be a *disseisin* unless at the election of *Charles Earl of Nottingham*, when as none of the parties intended it to be a disseisin, nor to OUST him of the possession: for, as *Co. Lit.* 153. b. defines, "a *disseisin* is when "one enters, intending to usurp the possession, and to OUST an-"other of his freehold;" and therefore *quærendum est à judice, quo animo hoc fecerit*, why he entered and intruded; and it is at the election of him to whom the wrong is done, if he will allow him to be a disseisor, or himself out of possession: and therefore if one receive my rent, it is at my election if I will charge him with a disseisin, by bringing an assise or other action, or have an account. And if an infant make a lease for years rendering rent, and the lessee enter, it is at the election of the infant to charge him in assise, or to bring debt for the rent, or to accept the rent at his full age, as 7. *Edw.* 4. 6. and other books be. So it is if one enters, claiming as guardian in *soccage*, or by *nurture*, where he is not, it is at the election of the infant to bring an assise, or to charge him as guardian, thereby admitting him to be in without wrong; as 49. *Edw.* 3. 10. 40. *Edw.* 3. "*Accompt*," 35. & 33. *Hen.* 6. 2. and many other books be. And tenant at will is at the will of both parties; and the will shall not be determined by every act. *Vide* 28. *Hen.* 8.

Dyer, 62. a. R. 228. 351. 432, &c. 1. Bl. Rep. 677. 3. Wilf. 527. Cowp. 303.

Lit. sect. 538.

Post. 306.

Co. Lit. 55. a.

Blossom against Rayer.

28. *Hen.* 8. 62. *Kelway*, 20. *Hen.* 7. 65. So where a feme lessee at will takes husband, or a *feme* makes a lease at will, and takes husband, although the *feme* hath put her will in her husband, yet it shall not be said a determination without the election of the lessor or husband to the contrary. 38. *Hen.* 8. *Dyer*, 62. Lessee surrenders, and yet occupies, he is no disseisor, but at the pleasure of the lessor, 11. *Ass.* 6. where a man makes a feoffment and continues in possession: and the common case where a copyholder makes a lease for years, not warranted by the custom, yet it is no disseisin; and the law accounts it a good lease betwixt lessor and lessee and all estrangers: and to that purpose was cited *Hilary*, 18. *Jac.* 1. *Rot.* 792. *Streat v. Virrall*, EJECTIONE FIRMÆ brought upon such a lease; and upon special verdict adjudged for the plaintiff, that it is a good lease against all but the lord. And they all relied upon another judgment in the point, betwixt *Powsley v. Blackman* (*a*), where one *Carr* bargains and sells land, by indenture inrolled, to *Bertram*, upon condition that upon payment of three hundred pounds at the end of three years it should be void; and that in the interim the bargainee should not meddle with the profits of the land, the bargainor occupies and makes a lease for five years, and at the day doth not pay the money; the bargainee doth not enter, but (the bargainor occupying it) he devised that land: and it was adjudged a good devise; but if he had been disseised, the devise had been void. And here it shall not be intended that the son intended to disseise his father, but that the lease was made by the assent of the father: also the party to whom the lease is made doth not claim any freehold, but to have the lease only, and to pay his rent, and pays the rent accordingly; so there was no intent in any of the parties to make a disseisin, then the law shall not construe it to be a disseisin *partibus invitis*. And hereby it follows, that the freehold remains in *The Earl of Nottingham* until the fine levied by him and his son; and so the uses well raised, and the jointure well assured.

5. Co. 10. a. Co. Lit. 55. b. 2. Sid. 339.

Dyer. 303. 2. Roll. Rep. 241. 241. 284. Bridg. 12. Palm. 201. 205. 2. Roll. Ab. 859. W. Jones, 316. 1. Barr. Rep. 212.

Post. 350.

Post. 388.

SECONDLY, Admitting there were a disseisin committed by these acts, the question is, Who is disseisor and tenant of the freehold? —And JONES, BERKLEY, and MYSELF held, that *William Lord Effingham*, who made the lease, is the disseisor and tenant; for when *tenant at will* takes upon him to make *a lease for years*, which is a greater estate than he may make, that act is a disseisin; and by this lease for years made, and the lessee's entering and paying the rent unto him, and he accepting thereof, he is in as lessee, and the lessor is the disseisor, and hath the reversion expectant upon this lease; and this lease betwixt them is an interest derived out of the inheritance gained by this disseisin: for if a lessee for years make a feoffment, although it be a disseisin to the lessor, yet it is a good feoffment betwixt them *de facto*, though not *de jure*, and the feoffee is in the *per*; as 4. *Edw.* 2. *Brev.* 403. 19. *Edw.* 2. *Brev.* 770. 15. *Hen.* 3. *Brev.* 878. *F. N. B.* 201. 8. *Hen.* 7. 6. *per finem temp. Edw.* 1. *Counterplee de Voucher*, 126. *& Co. Lit.* 367. a. And warranty may be annexed to such an estate, upon which he may vouch, as 50. *Edw.* 3. 12. And if such lessee for years, or at will, makes a gift in tail, or a lease for life, that creates a good lease or a good

R. 354. Cro. Jac. 660. Cro. Eliz. 830.

(*a*) Cro. Jac. 659.

gift

gift in tail amongſt themſelves and all others, beſides the firſt leſſor; and as to him they are both diſſeiſors, as it appears by the books 14. *Edw.* 4. 6. 18. *Edw.* 3. *Iſſue*, 36. 7. *Edw.* 3. *Iſſue*, 7. 14. *Edw.* 3. *Feoffments et Fayts*, 67. So it is where a leſſee at will makes a leaſe for years, eſpecially by indenture, it is a good leaſe between them, and debt lies for the rent; and the leſſee ſhall not avoid it but by an *ouſter* by the firſt leſſor, as 22. *Hen.* 7. 26. is. And JONES cited *Spark v. Spark* (*a*), where leſſee at will made a leaſe for years, and he, being ouſted by a ſtranger, brought an ejectment and recovered; and betwixt *Streat and Virrall*, *ut ſupra*. And ſo it was reſolved in this court, 28. *Eliz.* that an *ejectione firmæ* lies upon a leaſe made by a copyholder not warranted by the cuſtom againſt any ſtranger; and the Year-Book of 12. *Edw.* 4. 13. is directly to the point: ſo here, when leſſee for years enters according to the leaſe and pays his rent, the freehold betwixt them ſhall be in *William Lord Effingham*, who made the leaſe, and not in *Humphrys*, who is only leſſee; and then the fine levied by *The Earl of Nottingham* and his ſon conveys well the freehold, and the uſes are well raiſed upon this fine, and the jointure well ſettled; and then during her life *The Earl of Nottingham* hath no title to make a leaſe: wherefore the judgment ought to be reverſed; and ſo much the rather for the great miſchief which would enſue, if one who hath a tenant at will, who makes a leaſe for a ſmall time, and the firſt leſſor, not knowing thereof, levies a fine for a jointure for his wife, or to perform his will, or to other uſes, &c. if he ſhould be adjudged diſſeiſed, and as a diſſeiſee to levy a fine which ſhould tend to the benefit of the leſſee for years, and be adjudged a diſſeiſor againſt his intent or knowledge, as in this caſe is pretended, many ſhould loſe their inheritances. In many manors are divers tenants at will, where the father is tenant at will, and after him the ſon enters and occupies at the will of the lord, and is ſo reputed, and the lord allows them, and never accounted them as diſſeiſors; if ſuch tenants at will make under-leaſes for a year, or for half a year, if the lords of thoſe manors levy fines of thoſe manors, and this ſhould tend to the benefit of the under-leſſees, who ſhould be reputed to be diſſeiſors without the intent of any of the parties, many lords ſhould hereby be diſinherited: whereupon they concluded, that *Humphrys* the leſſee was neither diſſeiſor nor tenant, but only *William Lord Effingham*, and he is the diſſeiſor and tenant; and the fine levied by *Charles Earl of Nottingham*, and *William Lord Effingham his ſon*, is a good fine, and the uſes well raiſed, whereby *Elizabeth* the wife of the ſaid *William Lord Effingham* hath good title, and the defendant under her. Wherefore the judgment ought to be reverſed.

BLUNDEN *againſt* BAGGE.

(*a*) Cro. Eliz. 676. Hetley, 73. Moor, 569.

3. Com. Dig. 258.

Poſt. 484. 1. Burr. 112. 114.

But RICHARDSON, *Chief Juſtice*, argued to the contrary, and continued his former opinion, that *Humphrys* is the diſſeiſor, and was tenant of the freehold at the time of the fine levied: and then the fine by *The Earl of Nottingham* (being a diſſeiſee, and his ſon *William Lord Effingham* adjuter to the diſſeiſin) ſhall inure to bar the right of *The Earl of Nottingham*, and for the benefit of the ſaid *Humphrys*, according to the opinion in 2. *Co.* 56. *Buckler's Caſe*; and that he is a diſſeiſor to *The Earl of Nottingham*, not at his pleaſure, but *de neceſſario*; for a diſſeiſin is a tortious ouſting of any one from his ſeiſin;

Poſt. 484.

Brumpet *against* Baugh.

seisin: and here this taking of the lease by *Humphrys* from *Lord Effingham* tenant at will, and his entering by colour of the said lease, is a disseisin. And here is an entry *usurpando jus alienum* without consent of *The Earl of Nottingham:* and as tenant at will may not grant his estate, as 27. *Hen.* 6. *pl.* 3. is, no more may he make an estate; and *The Earl of Nottingham* hath no election to say it is no disseisin. But he agreed to the case, where an infant makes a lease for years, reserving rent, and the lessee enters, the infant hath election to allow him to be his tenant, or to be a disseisor, which is most for his advantage: so where one enters and claims as guardian and occupies, the infant may allow him either disseisor or accomptant, which shall be for his best advantage.

Ante, 303.

Cro. Jac. 660. Cro. Eliz. 830. Co. Lit. 57. a. Carth. 101.

SECONDLY, He held, that *Humphrys* is the sole disseisor and tenant of the freehold; for he, by his entry, did the sole act which made the disseisin: for the lease for years is merely a void contract; and when one enters by colour of a void conveyance, he is the disseisor, as in *Crofts v. Howels* (*a*) where a guardian assigned dower to a *feme* who is not dowable, and she enters, by her entry she is a disseiseress, 24. *Edw.* 3. *pl.* 43. If one enters by colour of a void extent, it is at the peril of him who enters and takes the profits, to see by what right he enters. And he denied that the making of a lease for years, is either an express or implied command to enter or make a disseisin. And he denied that the making of a lease for years had gained the reversion to the lessor; but if lessee for years, or at will, makes a lease for life, or a gift in tail, he, by making livery, transfers the freehold, and gains to himself the inheritance, but by a nude and void contract he cannot gain the reversion. Whereupon he concluded, that *Humphrys* is the disseisor and tenant, and that the fine inures to the benefit of *Humphrys*, and not to the limitation of the uses in the indenture, because none of the parties had any thing in the land at the time of the fine levied; and that the judgment ought to be affirmed.

(*a*) Plow. 530. 21. *Edw.* 3. 45.

Ante, 304.

But afterwards, for the reasons of us three, the judgment was reversed.

See Taylor on the demise of Atkins v. Horde. 1. Burr. Rep. 111. and Cowp. 701.

NOTE, SIR ROBERT HEATH; *Chief Justice* of the common pleas, CRAWLEY, *Justice*, BARON DENHAM, and BARON TREVOR, agreed with this judgment in the king's bench; and conceived, that it would be very mischievous if it should be adjudged otherwise. But SIR HUMPHRY DAVENPORT seemed to doubt whether the lessee for years ought not strictly to be taken for the disseisor and tenant.

Case 7.

Blizard *against* Barn.

Hilary Term, 8. *Car.* 1. *Roll* 816.

Where *other wrongs* are joined to an action for *words*, the plaintiff shall Carth. 225.

ACTION; for that *falsò et malitiosè* he spake of him these words: "That the plaintiff committed felony, and procured "him to be arrested for felony, and to be imprisoned for three days."

have full costs, though the damages are found under 40*s*. Ante, 141. 163.—Salk. 207. Strange, 645. Andr. 375. 2. Com. Dig. 546.

The

The defendant pleads "not guilty;" and found againſt him generally, and damages to twenty ſhillings. BLIZARD *againſt* BARR.

It was moved, that he might have no more coſts than damages, the damages being under forty ſhillings, upon the ſtatute of 21. *Jac.* 1. c. 16.

But becauſe there was a precedent ſhewn in the caſe of *Edwards v. Topſall* (a), where in an action for words, and for falſly and maliciouſly procuring him to be indicted of felony, and upon not guilty pleaded it was found againſt him, and damages taxed but at forty ſhillings, yet becauſe the action was not for words only, but for other wrong whereof he is found guilty, he had full coſts awarded him, it was reſolved here to be out of the ſtatute. Dougl. 667. 780. 1. Term Rep. 655. 3. Term Rep. 138. 391. 654.

(a) Ante, 163.

The Earl of Newport *againſt* Sir Henry Mildmay. CASE 2.

Michaelmas Term, 6. *Car.* 1. *Roll* 439.

ERROR to reverſe a judgment in a writ of entry for the manor of *Wanſted* againſt the *Earl of Newport*, where he appeared by his guardians, the *Earl of Southampton* and others, wherein they vouched the common vouchee; and judgment was given upon his default after appearance.

If an infant ſuffer a recovery and come in as vouchee, by himſelf, by attorney, or by guardian, and vouch the common vouchee, and he makes default, he ſhall be bound by it. 1. Roll. Ab. 731. 751, 752. 2. Roll. Ab. 573. 1. Leon. 218. 322. Jones, 38. 318. Hobart, 197. 224. 1. Sid. 321. Cro. Jac. 465. Cro. Eliz. 472. Dyer, 220. 1. Lev. 142. 2. Inſt. 483. Godb. 161. 1. Vern. 461. Ley, 83. Salk. 567. Strange, 94. Pigot on Recov. p. 64. Ld. Ray. 113. 3. Com. Dig. 163.

The error aſſigned was, Becauſe judgment is given by default, he being an infant.

It was argued at the bar by SIR JOHN BANKS and others, *for the plaintiff* in the writ of error, and by NOY, *the King's Attorney*, and others, *for the defendant*.

THE COURT reſolved, that it was not error; for the judgment is not given upon default of the infant, but upon departure of the vouchee in deſpite of the Court: and the Court is truſted, that they will not admit a guardian, but ſuch as ſhall anſwer to the infant for his loſs, if he hath any; and it is intended to be for his advantage: and *common recoveries* are *common aſſurances* of the realm, and ought not to be ſhaken; nor is there any pretence for an infant, who appears by his guardian, more than for any other perſon at full age: and it appears by 9. *Edw.* 4. *pl.* 34. and by many precedents ſhewn in the time of *Henry* 7. *Henry* 8. *Edw.* 6. *Queen Mary*, *Queen Elizabeth*, and *King James*, and in the time of this king, that ſuch recoveries have been ſuffered from time to time. And every precedent is a judgment, not *ſub ſilentio*, but in the conuſance of the Court; and it would be inconvenient to avoid ſo many recoveries; and it ſtands with law, that ſuch recoveries may be. Wherefore, without any open argument, the judgment was affirmed, notwithſtanding the opinion of 10. *Co.* 43. a. *Mary Portington's Caſe*, to the contrary.

2. Bac. Abr. 504. 3. Bac. Abr. 236. Cruiſe on Recov. 148. Co. Lit. 380. b. note (1). 2. Term Rep. 159.

Sir

Case 9. Sir George Symonds *againſt* Sir Michael Green and William Green his Son.

In Chancery.

If a perſon ſeiſed in fee of a manor, and other reputed manors, purchaſe other freehold lands occupied therewith, and makes a gift in tail comprifing as well the freehold lands as part of the manors, and then makes a mortgage by the words, "All the "lands thereto "appertaining, "or reputed part "of the ſame, "or within the "ſame," the parcels of land divided from the manor by the intail, and the freehold lands, though purchaſed only two years before, ſhall paſs by this mortgage.

Ante, 17. 57. 169.

Dyer, 97. 362. Moor, 190. Cro. Eliz. 16. 2. Roll. Ab. 186. 1. Mod. 251. 2. Mod. 69. Savil, 26. 2. Com. Dig. 532. 3. Com. Dig. 443. Cowp. 304. Dougl. 716. 1. Term Rep. 435.

THE LORD KEEPER, being aſſiſted by HUTTON, *Juſtice*, and JONES, *Juſtice*, in former hearings, and by ME in this laſt hearing, IT WAS DECREED, that Whereas *Sir William Green* was ſeiſed in fee of the manors of *Great-Milton* and *Little-Milton*, and the reputed manors of *Great-Chilworth* and *Little-Chilworth*, in the pariſh of *Milton*, and of divers lands in *Chilworth*, purchaſed 30. *Eliz.* of *Sir Michael Dormer*, and of other lands purchaſed 1. *Jac.* 1. which one *Ives* occupied together until 3. *Jac.* 1.: and then in conſideration of the marriage of *Sir Michael Green* his ſon with one *Milleſent Reade*, with whom he had 4500l. COVENANTS to ſtand ſeiſed of the ſaid manors of *Great-Milton* and *Little-Milton*, and of divers particular cloſes, by name in *Chilworth*, and of all his other lands, tenements, and hereditaments to the ſaid manors appertaining, or uſed and occupied with them, to the uſes following, *viz.* of the manor and premiſes, to the uſe of himſelf for life, without impeachment of waſte; and after, of ſuch a manor and ſome of the cloſes by name, to the uſe of *Anne* his wife for her jointure; and of other the particular cloſes before-mentioned, to the uſe of *Milleſent* for her life for her jointure; and after the deceaſe of *Sir William*, *Anne*, and *Milleſent*, to the uſe of the ſaid *Sir Michael Green* and the heirs males of his body, with a remainder to his right heirs: afterward *Sir Michael Green* and *Sir William Green* joined in a BARGAIN AND SALE of the manors of *Milton* and *Chilworth*, and all the lands thereto appertaining, or reputed as part of the ſame, or within the ſame; and they levy a fine by the name of THE MANORS and ten meſſuages, ſix hundred acres of land, two hundred *prati*, and ſeven hundred of *paſturæ*, which quantity compriſed as well the freehold lands as the manors.

The queſtion was, Whether the parcels of land divided from the manor by the intail, and the freehold land lately purchaſed, ſhould paſs by this mortgage?

And they ALL RESOLVED, that the lands intailed, which were parcel of the manor, ſhall not be ſaid to be ſevered from the manor: for the freehold never being ſevered, but remaining entire in *Sir William Green* during his life, ſhall paſs as parcel of the manor at the time of the mortgage; and that the freehold bought in and occupied with the manor, although it was but for two years before the mortgage, may paſs, being ſaid and reputed parcel, and by that name: and the fine is well enough guided by the indenture for the manors and for the freehold purchaſed, although they were not *in rei veritate* parcel of the manor; and a little time is ſufficient for the gaining a reputation: WHEREFORE IT WAS DECREED, that *Sir George Symonds* ſhould enjoy the manor and the freehold purchaſed; and that *Sir Michael Green* and his ſon ſhould make further aſſurance at the coſt of *Sir George Symonds*; and that this indenture is a ſufficient declaration of the uſes of the fine, as it was declared by all the ſaid Juſtices and by the Lord Keeper himſelf.

Johns

Johns *against* Stratford.

CASE 10.

Michaelmas Term, 8. *Car.* 1. *Roll* 96.

DEBT upon an obligation of two hundred pounds, upon condition to come to his lodging, and to go with him to the council at *Wales*.

A ſerjeant at arms of the marches of *Wales* is not an officer within 23. *Hen.* 6. c. 10.

The defendant pleaded (*u*) the 23. *Hen.* 6. c. 10. and that the plaintiff is a ſerjeant at arms, attending upon the preſident and council of the marches of *Wales*, and took that bond under colour of *an attachment* out of the ſaid court, and ſo void.

The ſtatute cannot be pleaded to a bond given to an officer of an inferior court upon an arreſt out of his juriſdiction.

The plaintiff hereupon demurred.

HENDEN, *Serjeant*, moved, that he was not any officer intended within that ſtatute, which extends only to ſheriffs and their bailiffs, and other miniſters and guardians of priſons; and ſerjeants at arms are not any of theſe officers, but immediate to the council of the marches of *Wales*: alſo the ſaid council is a court erected of late time and ſince the ſaid ſtatute, and cannot be intended within the ſtatute.

2. Vent. 257. 1. Saund. 157. 162. Dyer, 119. 364. 1. Lev. 254. 1. Sid. 383. Cro. Eliz. 66. Raym. 62. 220. Hardres, 464. Dougl. 94. 1. Term Rep. 418.

And THE COURT ſeemed to be of that opinion, but did not reſolve therein.

But becauſe it is ſhewn, that the plaintiff made the arreſt out of *the marches*, that is to ſay, in *London*, which is out of the juriſdiction, &c. then clearly this obligation is out of the intent of this ſtatute; therefore rule was given, that judgment ſhould be entered for the plaintiff, &c.

(*u*) It is now decided to be a public act, and therefore the Court will take notice of it, though it is not pleaded. 2. Term Rep. 509.

Starre *againſt* Buckhold.

CASE 11.

A PROHIBITION was granted upon the motion of GRIMSTON to ſtay a ſuit in THE ARCHES for theſe words, "Thou art a drunkard, a drunken fellow, a baſe idle drunken fellow," becauſe theſe words tend to a temporal offence, and are puniſhable as a temporal offence (*a*), and not puniſhable in the eccleſiaſtical court.

To call a man *a drunkard*, is a temporal offence. Ante, 189.

(*a*) See the ſtatutes 4. Jac. 1. c. 5. the 21. Jac. 1. c. 7. and the 22. Geo. 2. c. 33.

Trinity Term,

9. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1. Thomas Gwin and Bridget his Wife *againſt* David Gwin.
Hilary Term, 5. Car. 1. Roll 295.

In a *quod ei deforciat* againſt huſband and wife, if the wife plead as tenant for life of part of the premiſes, with reverſion to her huſband, and ſay nothing as to the reſidue, and judgment be given againſt both as to all the premiſes, it is erroneous.

S. C. Godb. 448. 2. Inſt. 350. Jones, 381. Cowp. 766. Dougl. 683.

ERROR of a judgment in the grand ſeſſions in the county of *Brecknock*, by DAVID GWIN, in a *quod ei deforciat*, PROTESTANDO "*proſequi breve illud in formâ et naturâ brevis* "*de recto ad communem legem, ſecundum formam ſtatuti* RUTLAND, "*de tribus meſſuagiis, 200 acris terræ, 100 acris prati, 60 acris paſ-* "*turæ, et 100 acris boſci, et medietatem molendini in* LLAUNYHAGELL, "*et jus et hæreditatem ſuam; et unde dicit, quòd ipſemet fuit ſeiſitus de* "*tenementis prædictis et medietate prædicti molendini in dominico ſuo ut* "*de feodo et jure, &c. Et quod tale ſit jus ſuum, offert, &c.*" "And the ſaid THOMAS and BRIDGET *ven. et defen. jus prædict.* "DAVID *et ſciſinam, &c.* and *imparlo, &c.*"---At the next ſeſſions the plaintiff counts *ut antea verbatim*; and the defendant BRIDGET pleads, that ſhe "*majus jus habet tenendi 100 acras terræ, 30 acras* "*prati, et 40 acras paſturæ, parcel. tenementorum modo petit. pro ter-* "*mino vitæ ſuæ, reverſionem inde præfato* THOMÆ *et hæredibus ſuis,* "*quam prædictus* DAVID *habet ad tenendum tenementa prædicta, &c.* "*Et de hoc ponit ſe ſuper patriam; et prædictus* DAVID *ſimiliter.* "*Et prædictus* THOMAS *dicit, quòd ipſe habet majus jus tenendi tene-* "*menta prædicta et medietatem prædict. molendini, cum pertinentiis,* "*ut illa tenet, quam prædictus* DAVID, &c. *Et de hoc ponit, &c.* "*Et prædictus* DAVID *ſimiliter.*" The jury found both iſſues for the demandant; and judgment entered, "*quòd recuperet verſus præ-* "*fatos* THOMAM *et* BRIGETTAM *prædicta tenementa et medietatem* "*prædicti molendini cum pertinentiis tenend. ſibi et hæredibus ſuis quieti* "*de præfatis* THOMA *et* BRIGETTA *et hæredibus ſuis in perpetuum,* "*&c.*"

Upon this judgment a writ of error was brought; and becauſe the writ of error ſuppoſed that the proceedings were *in curiâ noſtrâ*, where it appears by the record that the beginning thereof was in 22. *Jac.* 1. therefore the writ of error was abated, and a new writ of error brought *coram nobis reſident.*; and upon it divers errors were aſſigned by MR. PROTHORO:

FIRST, That the writing being a *quod ei deforciat*, the proteſtation being *proſequi in naturâ brevis de recto*, he ought to ſhew what writ of right, for there be divers kinds of writs of right.—But that was diſallowed.

SECONDLY, That THE DEFENCE is not well made; for in a writ of right there ought to have been a double defence, *viz.* the plaintiff's right, and to maintain his own right.

THIRDLY,

THIRDLY, That the defendants, joining in defence, ought not to have ſevered in their pleas. GWIN *againſt* GWIN.

FOURTHLY, That the plaintiff, having admitted them to plead ſeveral pleas, and taken ſeveral iſſues upon their ſeveral pleas, hath admitted that they are ſeveral tenants, and ſo hath abated his own writ.

FIFTHLY, Becauſe *Bridget* pleads as tenant for life for part of the tenements, alledging the reverſion to be in *Thomas*, and for the reſidue pleads nothing, nor claims any eſtate, yet judgment is given againſt *Thomas and Bridget* and their heirs, for all the tenements; and ſo a final judgment againſt the *feme* for all where ſhe pleads but to part, and againſt her heirs where ſhe claims but for life.

And THIS WAS HELD a manifeſt error: wherefore, for this cauſe principally, the judgment was reverſed.

CASE 2.

The King *againſt* Sherington Talbot.

QUO WARRANTO, by which he claims liberty of free warren in *Ridge* and two other towns in the foreſt of *S.*

A preſcription to have a free warren in a manor and in the *demeſnes* thereof is good. Ante, 17. 2. Roll Abr. 619. Jones, 320. Cro. Jac. 156. 327. 6. Co. 14. 1 Peere Wms. 221.

The defendant diſclaims to have ſuch liberties in the ſaid two vills and in the foreſt. But as to his claim of warren in *Ridge*, he pleads, that he is ſeiſed in fee of the manor of *Ridge*, whereof the ſaid vill of *Ridge* is parcel; and that he and all his anceſtors, and all whoſe eſtate he hath in the ſaid manor, have had, time whereof, &c. liberty of free warren in all the ſaid manor, and within the demeſnes thereof, *ita quòd nullus fugabit* any game of warren within the ſaid manor and demeſnes thereof *ſine licentiâ* of the ſaid *Sherington Talbot*.

Iſſue was taken, that he and all thoſe whoſe eſtate, &c. had not free warren within the ſaid manor and demeſnes thereof; and found for the defendant.

NOY, *Attorney General*, now moved in arreſt of judgment, FIRST, That the plea is not good to preſcribe to have warren in the ſaid manor and demeſnes of the manor; for although he may preſcribe to have it in his own demeſnes, yet he cannot preſcribe to have it in the lands of others his freeholders, nor ought he to preſcribe to have it pertaining to his manor; and for that purpoſe he cited *The Book of Aſſiſes* (*a*), that one ought not preſcribe to have *turbary* in another's ſoil as appertaining to his manor. SECONDLY, Becauſe it is by preſcription, *ita quòd nullus ſine licentiâ* SHERINGTON TALBOT, which is impoſſible to be, for the time whereof, &c.

ROLLE anſwered to theſe objections, FIRST, That a preſcription to have free warren in his manor is good as well in the lands of the freeholders as in the demeſnes; for being by preſcription, it is intended, that this liberty was before the creation of the freeholders, whoſe eſtate was extracted out of the demeſnes of the manor after the beginning of this preſcription.—SECONDLY, That the allegation thereof is not of neceſſity, and doth not vitiate the preſcription.

GRIMSTON alſo moved in arreſt of judgment, THIRDLY, That the trial was by *venire facias* awarded from *Ridge*, where it ought

On iſſue on a plea of preſcription to have free warren in the manor of *A.* if the *venue* be from *A.* inſtead of the *manor* of *A.* it will be a *miſ trial*. —But ſee the 24. *Geo.* 2. c. 18. ſ. 3.

(*a*) 5. Aſſiſe, pl.

THE KING *againſt* TALBOT.

to have been of the manor, for *Ridge* is alledged to be but parcel of the manor.

And ALL THE COURT, for this cauſe, held it to be a *miſ-trial*, and not aided by any of the ſtatutes; and that it ought to be of the manor, which is the greater and more notorious: wherefore a *venire facias de novo* was awarded.

The ſtatutes of *Jeofail* do not extend to informations *quo warranto*, or to proceedings on *penal ſtatutes*.

2. Lev. 139.
3. Lev. 375.
1. Salk. 325.
1. Com. Dig. 348.
4. Burr. 2527.
Cowp. 392.

And it was moved, Whether that were within the ſtatutes of *Jeofails*, becauſe it concerns the king, and the ſtatutes have an expreſs *proviſo*, that they ſhall not extend to appeals or indictments or informations upon penal laws, and cited ſome of them, but not any *quo warranto*?

RICHARDSON, *Chief Juſtice*, JONES, and BERKLEY, held, that the ſtatutes did not extend to this caſe, nor to informations of intruſion, for the king is not bound unleſs he is named.

But NOY, *Attorney General*, ſaid, peradventure it ſhould be otherwiſe in caſe of a *quare impedit*, where the ſuit is betwixt the party and the king.

But ſee now the 9. *Ann* c. 20. as to informations in *quo warranto*, and the Caſe of Atcheſon v. Everet, Cowp. 392. that the ſtatutes of *Jeofail* extend to *penal actions*, though not to *criminal proſecutions*.

CASE 3.

Townley *againſt* Chalenor.

In the Chancery.

Truſtees ſhall only be anſwerable for the monies they reſpectively received.

3. C. Brigg. 35.
Hardres, 314.
2. Salk. 318.
Prec. in Ch. 273.
3. Atk. 582.
1. Peere Wms. 81.
2. Vern. 241. 504. 513. 570.
8. Bac. Abr. 402.
See the Caſe Sadler v. Hobbs, 26. *Geo.* 3.
2. Brown's Ch. Rep. 114. and Bartlet v. Hudſon, 1. Term Rep. 42.

UPON a bill of review to reverſe a decree there, THE LORD KEEPER required the aſſiſtance of JUSTICE JONES, by whom the decree was made, and of JUSTICE HUTTON, JUSTICE BERKLEY, JUSTICE CRAWLEY, and MYSELF.

The Caſe was, That *Thomas Foſter* and *Townley* being aſſignees in truſt of a leaſe to the benefit of *Chaloner* an infant, *Thomas Foſter* took all the profits, and was in arrear upon account 1500l. and being unable to ſatisfy, the queſtion was, Whether *Townley*, agreeing to this aſſignment by ſealing the counterpart thereof, and joining with *Foſter* in acquittances of the rents for a year and half (but never more meddled), ſhall be charged only for that wherein he had joined in the acquittances, or for all the reſidue?

And IT WAS RESOLVED, that *Townley*, being but a party intruſted, ſhall not be anſwerable for more than came to his hands; for it was the default of him who put them in truſt to repoſe truſt in one who was not able to pay, and he being the party truſted as well as *Townley*, *Townley* ſhall not be compellable to ſatisfy his defect. Wherefore it was reſolved, THAT that part of the decree whereby he was charged to pay what *Thomas Foſter* could not, ought to be reverſed.

CASE 4.

Eyres *againſt* Taunton.

Cujus Principium ante, page 295.

The firſt *ſcire facias* on a recognizance ought to be in the county where acknowledged; but on a return that he hath no lands, that no heir can be found, or that the party is dead, a *teſtatum ſcire facias* ſhall iſſue to another county. Ante, 296. 5. Com. Dig. 214. 347.

IT was moved again by MALLET for the defendant in ſtay of judgment. Whereas the plaintiff the laſt Term procured a new *ſcire facias* out of this court, directed to the ſheriff of *Glouceſter*, to ſummon the heir of *Cawley*, becauſe he had not made any mention in his former return of the heir, and thereupon this writ iſſued out of the court, *ex officio Curiæ ad informandum Curiam*, and the

ſheriff

sheriff had returned, that *Cowley* had not any lands in his bailiwick which descended to his heir, nor any heir within his bailiwick, &c. that yet no judgment ought to be given:

Lyne *against* Taunton.

First, Because this *scire facias* ought not to have been awarded to the sheriff of *Gloucester* but upon a *testatum* that the first *scire facias* was awarded to the sheriff of *Middlesex*, where the recognizance was first acknowledged; for being grounded upon a record, he ought first to sue the *scire facias* there; and upon return that there if not any heir there, then to have this in another county: and he cited *The Book of Entries*, 500. and 2. *Edw.* 3. 20.—*Sed non allocatur*: for true it is, the first *scire facias* upon a recognizance to have execution ought to be in the county where it was acknowledged; but when it is sued there, and the party returned dead, it may be sued against the heir or *terre-tenant* in any county where the party surmiseth he hath land. Also this *scire facias* is *ex officio Curiæ*, and in favour of the party, and there is no reason he should take exceptions to it.

Sid. 398.

The Second Exception was taken to the return of the writ; for it is returned, that there is not any heir within his bailiwick, where it ought to have been, that there is not any *terre-tenant*, and that there is not any heir generally.—*Sed non allocatur*: for the return upon the first *scire facias* shews what lands he had, and it shall not be intended there be more lands when no heir is found there, and the sheriff hath no authority to enquire into other counties.

The return to a *scire facias* may say "no "heir" within *his bailiwick.*

The Third Exception, That the return upon the second *scire facias* in chancery, whereupon the plea is pleaded and issue joined, was insufficient, for the reasons before alledged, and the trial ill.—But now all the Court agreed, although the return had been better if it had found who was heir and that he was warned, or that there was not any heir in the said county, yet it is well enough; for as 17. *Edw.* 2. *tit.* "*Execution*," 139. anciently the *scire facias* was only against the *terre-tenant*, and the heir was not charged in the *scire facias* but as *terre-tenant*; and if the return be not good or formal, yet it is aided by the statutes of *Jeofails*; and the misi-return or insufficient return of the sheriff also, *quoad* the heir (because he is not named in the return), is but a *discontinuance*, which is aided by the statute of *Jeofails*. Wherefore Richardson, Jones, and Berkley, agreed, that there was not any cause after verdict to stay judgment, whereto I assented.

The omission in a return to a *scire facias* on a recognizance to find who was *heir*, is aided after verdict.

3. Co. 12. 11. Co. 6. 1. Roll Rep. 31. Cro. Jac. 304. 1 Bac. Abr. 91. 2. Ric. Abr. 208.

The Fourth Exception, That it was not a good trial by *nisi prius*; for issue being joined in chancery, and the record delivered into the king's bench to be tried, it ought there to have been tried, and not by *nisi prius*.—But all the Court was against it; for issue, being joined betwixt party and party, may well be tried by *nisi prius* out of this court, and so are many precedents. Wherefore judgment was given for the plaintiff.

Issue joined in chancery upon a *scire facias* may be tried by *nisi prius* out of the king's bench. Ante, 295.

4. Term Rep. 402.

Randall *against* Scory.

Easter Term, 8. *Car.* 1. *Roll* 423.

Case 5.

Error of a judgment in the common pleas, in a *replevin*, where the defendant avows for an *heriot*, upon a lease made by inden-

If a declaration state a lease "to *A. B.* and *C.* paying a heriot after the death of *A.* his executors and assigns," and it appear on oyer of the lease to be "to *A. B.* and *C.* paying an heriot to the lessor after the death of the said *A. B.* and *C.* and every of "them," the *variance* is fatal. Post. 418.

RANDALL against SCORY.

S. C. 2. Roll Abr. 451. S.C. Hetley, 57. 1. Roll. Abr. 192. 2. Roll. Abr. 457. 3. Bac. Abr. 53. Cowp. 178. 768. Dougl. 866. 1. Term Rep. 836.

ture to *Robert Chicheſter*, his executors and aſſigns, for ninety-nine years, if the ſaid *Robert Chicheſter*, *John Bellun*, and *James Bellun*, or any of them, ſhall ſo long live, rendering rent; and "rendering "and paying after the death of the ſaid *Robert Chicheſter*, *his exe-* "*cutors and aſſigns*, his or their beſt beaſt for an *heriot*, or fifty "ſhillings, at the election of the leſſor, his heirs or aſſigns:" and becauſe the ſaid *Robert Chicheſter* aſſigned this leaſe to the plaintiff, and after died, for non-payment of the *heriot* after the death of the ſaid *Robert*, he diſtrained; and avows, &c. The plaintiff demands *oyer* of the indenture, which was entered *in hæc verba ut prius*. But the clauſe for the *heriot* was, "rendering and paying to the leſſor, "his heirs and aſſigns, after the death of the ſaid *Robert Chicheſter*, "*John Bellun*, *James Bellun*, and every of them, his or their beſt "beaſt in the name of an *heriot*, or fifty ſhillings, &c." *ut antea*. And for this variance the plaintiff demurs, and judgment given for the plaintiff, and error thereof brought. The error aſſigned was in point of law.

ROLLE, *for the plaintiff* in the writ of error, moved, that this is no variance, and that the avowry is good; for the leaſe being to him, his executors and aſſigns, the reſervation of the *heriot*, in conſtruction of law, is the reſervation of him, his executors, and aſſigns, *viz.* after the death of him, his executors, or aſſigns, his or their beſt beaſt; for it cannot be conſtrued the beſt beaſt of *Bellun and Bellun*, for they are ſtrangers to the deed, and have nothing to do therewith.

But ALL THE COURT held, that there is a plain and manifeſt variance; for although the beſt beaſt of *Bellun and Bellun* cannot be conſtrued to be meant thereby, yet the reſervation is not, that it ſhall be paid after the death of the executors or aſſigns, but only after the death of *Chicheſter*, *Bellun*, *and Bellun*, ſo as they are the parties after whoſe death the limitation of the *heriots* are to be paid, and not after the death of the executors or aſſigns. Wherefore the avowry was ill, and the judgment affirmed.

CASE 6.

Penn's Caſe.

Fiſhmongers may be indicted for ingroſſing, notwithſtanding the exception in 5. *Edw.* 6. c. 14. and the indictment may be tried at the ſame ſeſſion of gaol delivery it is found, on iſſue joined by the clerk of the peace.

PENN, a fiſhmonger of *London*, was indicted at *Newgate* ſeſſions, For that he ingroſſed divers kinds of fiſh, *viz.* ſmelts, whitings, &c. *eâ intentione ad revendendum contra formam ſtatuti*. Unto this he pleaded not guilty; and the indictment was moved hither by *certiorari*.

HENDEN, *Serjeant*, moved in arreſt of judgment, that by the expreſs words of the act of 5. *Edw.* 6. c. 14. (*a*), fiſhmongers and butchers, &c. are not ſaid to be ingroſſers, nor within the ſtatute for ingroſſing, if they buy only things belonging to their trade; for it is not the intent of the ſtatute to reſtrain them, it being neceſſary and for the benefit of the ſubjects that they ſhould buy ſuch things.

But THE COURT held, that although they be not within the ſtatute for ingroſſing, yet if they regrate and ſell at unreaſonable prices, they are expreſsly within it; and he is indicted, that he bought *eâ intentione ad revendendum contra formam ſtatuti*, and is found guilty:

(*a*) Repealed by 12. Geo. 3. c. 71. See Hawk. P. C. 6. edit. 8vo. 434.

ſo

so it shall be intended that he ingrossed, and did not sell at reasonable prices; and if he ingrossed and sold at reasonable prices, it ought to have been shewed to the jury upon the evidence, as all the Court agreed, there being a proviso contained in the act, that one may take advantage by giving in evidence without formal pleading thereof: and forasmuch as he is found guilty, it shall be intended, that he ingrossed *contra formam statuti*. Wherefore rule was given, that judgment should be for the king against the defendant, unless other matter were shewn to the contrary upon the *Monday* following. PENN's CASE.

At which day GRIMSTON moved, that the trial was ill, because it was tried at the same sessions that he was indicted; which ought not to have been, but to have had a *venire facias* returnable at the next sessions: and he relied upon 22. *Edw.* 4. "*Corone*," 44.—*Sed non allocatur:* for it is the usual and common course to try it at the same time the party is indicted; especially as this case is, being at the gaol-delivery and the party in prison. *Vide* 9. *Hen.* 8. *Kelloway*, 159. that trial before justices of gaol-delivery may be the same day. Justices of *gaol-delivery* may order *a jury* to be returned *instanter* for the trial of a *prisoner* arraigned before them. Post. 340. 448. 583.

Keilw. 159. 256. 1. Sid. 335. 2. Hawk. P. C. 572. 5. Bac. Abr. 239.

THIRDLY, He shewed that the entry is, that the defendant pleaded not guilty; "*et de hoc ponit, &c.* ET JOHANNES MICHAEL *qui pro rege sequitur similiter, &c.*" and it doth not appear by what authority he joined that issue; for the king's attorney, or one that is *in loco suo*, ought to have joined—*Sed non allocatur*: for the said *John Michael* is the clerk of the peace in *London*, and he is an officer known to the said court where the indictment was taken, and it needs not to be so mentioned in the record; and the Court here knows it well enough. Wherefore IT WAS ADJUDGED accordingly for the king. On indictment, the clerk of the peace shall join issue for the king; and the entry of the *similiter* in his *name*, although it omit his *office* and *authority*, is good. Cro. Jac. 502.

3. Com. Dig. 512. Cases in Crown Law.

Porter *against* Hutchman.

CASE 7.

ERROR of a judgment in the common pleas, in action on the case in nature of a conspiracy. The error assigned was, Because in the declaration it is supposed that he procured him to be indicted, and to be imprisoned until he was *legitimo modo acquietatus*, and doth not say *inde*. In an action for a malicious prosecution, it is sufficient for the plaintiff to state that he was *legitimo modo acquietatus*, without adding *inde*. Ante, 286. Post. 419.

WARD, *Serjeant*, moved, that it was error; for it was a word of substance, and the cause whereby he entitles himself to the action: and he said, that this judgment passed *sub silentio* in the common pleas. And that in two other such actions brought by the same party against two others being moved in arrest of judgment, after verdict it was adjudged for the defendant. A record was shewn in this court in *Hilary Term*, 41 *Eliz. Roll* 1099. *Pricket's Case*, where, after verdict for the plaintiff, this exception was moved in arrest of judgment; and it appears upon the roll that no judgment was given.—And RICHARDSON, *Chief Justice*, said, that he was of counsel with the defendant; and for this cause only the judgment was stayed. Dougl. 215. 2. Term Rep. 225. 231. 4. Term Rep. 247.

BULSTRODE, *for the defendant*, shewed, that in *Easter Term*, 7. *Jac.* 1. *Roll* 407. *Bell v. Gamble* (*a*), in the like action on

(*a*) Cro. Jac. 230.

Porter *against* Hutchman.

the caſe, where the word *inde* was omitted, and exception taken for that cauſe, yet after divers motions in ſtay of judgment, and divers continuances, judgment was given for the plaintiff.

Jones and Berkley, *Juſtices*, were of opinion, that the judgment ſhould be affirmed, becauſe it ſhall not be intended but that he was *acquietatus inde*, and not of any other matter; and the precedents are both ways, and in the writ of conſpiracy *inde* is omitted; and by the ſame reaſon in action upon the caſe, the omiſſion of *inde* is no cauſe to avoid the judgment.

But Richardson, *Chief Juſtice*, and Myself, much doubted thereof, by reaſon of thoſe two laſt judgments, and of *Pricket's Caſe*, and conceived, that the declaration was ill for this omiſſion; for if he were not *acquietatus inde*, it is clear an action would not lie; and therefore, being the material clauſe which maintains the action, the omiſſion thereof is fatal; for a declaration ſhall not be aided by intendment in the point of the action: and in the greater part of the precedents in print the word *inde* is in the declaration.—*Et adjournatur* (*a*).

(*a*) It was moved again, and the declaration adjudged to be good. Poſt. 420.

Case 8.

Anonymous.

The omiſſion of the oath required by 21. *Jac.* 1. c. 5. in *qui tam* will not vitiate the record.

3. Inſt. 193. 4. Inſt. 272. *Sed vide* Salk. 376. And. 25. 3. Com. Dig. 319. 3. Bac. Ab. 40. 2. Hawk. P. C. 383, 384, 385.

Error of a judgment in *Coventry*, in an information upon the 5. *Eliz.* c. 4. ſ. 31. for exerciſing the trade of *an ironmonger* (*a*), not being apprentice. After verdict and judgment there for the plaintiff,

The First Error aſſigned by Grimston was, Becauſe by the 21. *Jac.* 1. c. 5. it is appointed, that every common informer ſhall be ſworn before his information be received, that the fact was *within the year* before the information exhibited, and *within the ſame county* where it is exhibited; and it doth not appear here that it was done ſo in this caſe.—*Sed non allocatur*: for it is no parcel of the record, but is only a direction to the officers that none ſhall be received, unleſs he be firſt ſworn (*b*).

(*b*) See White *v.* Bote, 2. Term Rep. 374. *contra*; but Leigh *v.* Kent, 3, Term Rep. 382. *accord.*

Informer may ſue for a moiety of the penalty given by 5. *Eliz.* c. 4.; for it is only the king's moiety that ſhall be given to the corporation. Moor, 886. Hob. 183. 3. Com. Dig. 573.

The Second Error, Becauſe informers cannot ſue upon that ſtatute to have the moiety; for by the expreſs words in the ſtatute the forfeiture is given to the corporation, for the benefit of the corporation, for relief of the poor, and for other uſes of the corporation.—*Sed non allocatur*: for though that ſtatute gives one moiety to the informer, and the other moiety to the king, except in corporate towns to whom ſuch forfeitures are granted, it is to be underſtood, and ſo hath always been expounded, that in that caſe the forfeiture given to the king belongs to the corporation, and the informer is to have his part ſtill. Whereupon judgment was affirmed.

(*a*) *Vide* 3. Com. Dig. 571. Poſt. 348.

Case 9.

Parker *againſt* Taylor.

Michaelmas Term, 8. *Car.* 1. *Roll* 366.

Debt on an *obligation* and on a *mutuatus* may be joined. Keb. 147. 1. Vent. 366. 8. Co. 87. Raym. 233. 3. Lev. 99. 3. Term Rep. 433. 659. 779. 4. Term Rep. 347.

Error of a judgment in *Beverley Court* in debt; where the plaintiff declares in debt of 20l. *viz.* 11l. upon *an obligation*, and 4l. upon *a mutuatus*. The defendant pleaded *quoad* the 4l. non

debet;

BERET, *et de hoc ponit se super patriam; et prædictus querens similiter. Et quoad* the other, he demands *oyer* of the obligation and condition, which was read to be upon condition to pay eight pounds at a day, &c. and he pleads payment at the day, *et de hoc ponit, &c.* and the plaintiff *similiter*, and verdict for the plaintiff *quoad* the bond; and *quoad* the other for the defendant; and judgment for the plaintiff. PAYNE *against* TAYLOR.

The error assigned was, That here is not any issue; for the defendant ought to have pleaded *quod solvit, et hoc paratus est verificare*, and the plaintiff ought to have replied *non solvit, et hoc petit, &c.* so there had been an affirmative and a negative; but as it is here there is no issue at all, and it is not aided by any statute; and therefore it was prayed, that the judgment might be reversed.

Where a plea concludes to the *country*, instead of to the *court*, if issue be joined, the error is aided by the 32. *Hen.* 8. c. 30. Post. 593. 1. Sid. 290. 341. Cro. Jac. 554. 580. 589. Hob. 233. Dougl. 94.

But ALL THE COURT held, forasmuch as the defendant pleads payment, *et de hoc, &c.* and the plaintiff joins with him, that the jury shall enquire whether he hath paid, and the jury finding that he hath not paid, it is good enough, and aided by the 32. *Hen.* 8. c. 30. of *Jeofails*. Wherefore the judgment was affirmed.

Stra. 551. Comp. 407. 575.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

Leycroft *against* Dunker.

CASE 18.

Easter Term, 9. Car. 1. Roll 152.

ACTION FOR WORDS. Whereas the plaintiff for twenty years had used the trade of merchant, and yet useth the same; and in the fifteenth year of king *James* used the said trade, and went to *Hamburgh*, and there used it until 22. *Jac.* 1. and then returned to *England*, and used the trade of a merchant; the defendant, to scandalize him in his profession, spake these words of the plaintiff the first of *October*, 8. *Car.* 1. "He came a broken merchant from *Hamburgh* (*innuendo* at his returning from *Hamburgh* into *England*); and that I will justify."

Words importing slander in the time past, as "he came a broken merchant from *Hamburgh*," are actionable. Ante, 199. S. C. Jones, 321. S. C. Hutt. 125. Cro. Jac. 241. 579. 622. Yelv. 153. 1. Com. Dig. 188. 2. Term Rep. 473.

The defendant pleaded not guilty; and found against him, and damages 20*l.*

GRIMSTON moved in arrest of judgment, that these words are not actionable: for although it is to be agreed for saying of a merchant "that he is broken," in the present tense, an action lies; for it is all one as if he had said he is a bankrupt, which is a great discredit to a merchant; yet when he saith that he came over a broken merchant from *Hamburgh*, it doth not import in itself any scandal; for he shews that he came over eight years before, and he might become a rich man and of good credit since that time.

RICHARDSON, *Chief Justice*, was of that opinion; for slander ought to be expressed, and not taken by intendment or implication; therefore if one saith of a merchant, that "he was a poor man "within this seven years," or of a workman, that "he was a weak "workman, and had little skill within these few years," an action lies not, for he may be rich or a good workman at the time of the speaking.

But JONES, BERKLEY, and MYSELF held, that the action well lies, and it is not like the cases before put; for there they do not charge him with any crime, and by intendment it may have good construction; but here he chargeth him with being once broken,

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Leycroft *againſt* Dunkle.

et qui ſemel malus ſemper præſumitur eſſe malus eodem genere, or at leaſt may have an inclination thereto (*a*); and it being alledged to be ſpoken *falsò et malitiosè*, and to ſcandalize him in his profeſſion, it is a great cauſe of diſcrediting and impairing him in his trade, whereas their credit is the principal means of their gain: and if he intended it otherwiſe, or had ſpoken it in another ſenſe, he ought to have ſhewn it by ſpecial plea, which would have excuſed him; but when he is charged with malicious ſpeaking of thoſe words, and with an intent to diſcredit him, and he pleads not guilty, and found againſt him, that he ſpake maliciouſly, and with intent to diſcredit him, the Court may not otherwiſe adjudge. Wherefore it was adjudged for the plaintiff.

(*a*) *Sed vide* Carſlake *v.* Maple Durham, 2. Term Rep. P. 473.

Case 11.

Green *againſt* Lincoln.

To call another "a long-ſhag-haired-murthering rogue," is actionable.

8. C. Jones, 326. 2. Roll. Ab. 47. 1. Sid. 103. 2. Lev. 90. Hardres, 7. 1. Com. Dig. 186. Cowp. 276.

ACTION FOR WORDS: "Thou art a long ſhag-haired "murthering rogue." Upon not guilty pleaded, it was found for the plaintiff.

Grimston moved in arreſt of judgment, that theſe words are not actionable; for he doth not charge him directly with the murder of any perſon, nor ſaith that he is a murderer, but the words are adjectively ſpoken; which manner of ſpeaking ſhews that the words are of chiding, and do not aggravate but extenuate *quoad* the manner of ſpeaking.

Henden, *Serjeant*, moved to have judgment for the plaintiff; and cited *Wilſon v. Meaſon* (*a*) in the common pleas, where it was adjudged after debate, that for theſe words, "Thou art a murther-"ing knave," action lies; but he had not the record to ſhew.

The Court therefore adviſed till the next Term: and afterwards, in *Michaelmas Term*, 9. *Car.* 1. being moved again, it was adjudged for the plaintiff.

(*a*) 1. Roll. Abr. 47.

Case 12.

Fiſh *againſt* Wagſtaff.

Judgment in the *Marſhalſea* reverſed, becauſe it was recited that they had authority to hear, &c. "all "cauſes."

Poſt. 558. 595. Dyer, 175. Cro. Jac. 314. Cowp. 28.

ERROR of a judgment in the court of the *Marſhalſea*, by virtue of a new patent.

The error aſſigned was, Becauſe in the ſtile of the court it was mentioned, that the court is holden by virtue of the king's letters patents *coram* ſuch perſons, *judicibus noſtris, ad audiendum et terminandum aſſignat. omnia placita perſonalia inter omnes perſonas infra duodecim leucas in palatio regis apud Weſtmon. et inter omnes homines de hoſpitio domini regis, tam diu quàm hoſpitium domini regis eſt infra duodecim leucas à palatio Weſtmon.*

The Court. A patent *ad audiendum et terminandum omnes cauſas* cannot be, but it ought to be only of criminal matters; and for that reaſon the judgment was reverſed.

Sparrow

Sparrow *againſt* Matterſock and Others.

Case 13.

Hilary Term, 8. Car. 1, Roll

TRESPASS. Upon a demurrer the caſe was, The ſheriff returns upon an *elegit* that the party had not any lands, but only within the liberty of *St. Edmundſbury*, and that *J. S.* bailiff there, hath the execution and return of all writs, who enquired, and returned an *extent* by inquiſition; and that the bailiff delivered the moiety of the ſaid land extended to the party, and that the plaintiff by virtue of that *extent* entered and intitled himſelf. The queſtion was, Whether it were a good title for the plaintiff?

The bailiff of a liberty may execute an *elegit* by warrant from the ſheriff; but the jury ſhall find *all* the land, and the officer ſhall deliver *the moiety*.

FIRST, Whether the bailiff of a liberty may make an inquiſition and extent upon an *elegit* by warrant from the ſheriff directed to him?—RESOLVED, that he may.

1. Sid. 92. 239. Carth. 453. 2. Salk. 164. 2. Inſt. 396. Dyer, 100. Cro. Eliz. 584. Hobart, 83. 4. Co. 65. b. 1. Vent. 259. 1. Salk. 563. Strange, 874. 3. Com. Dig. 305. 5. Com. Dig. 445. Dougl. 472.

SECONDLY, When a jury by inquiſition finds the ſeiſin and value of the land, Whether the jury ought to ſet out the moiety for the plaintiff, or if the bailiff may deliver ſuch part of the land for the moiety?

And IT WAS RESOLVED, that the jury ſhall extend all the land, and the bailiff where there is a franchiſe, and the ſheriff (where no franchiſe is) ſhall deliver the moieties, and not the jury; and ſo are all the precedents. Wherefore it was adjudged for the plaintiff.

Michaelmas

Michaelmas Term,

9. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

CASE 1.

Thomas Broxon and his Wife *againſt* Dager and his Wife.

Trinity Term, 9. *Car.* 1. *Roll* 1152.

The imputation of being a witch generally, without ſome act of witchcraft alledged, is not actionable. See 9. Geo. 2. c. 5. Ante, 282. Poſt. 324.

ACTION for theſe words, ſpoken by the wife of the defendant of the plaintiff's wife: "Thou art a witch: I will "make thee come and ſay, *God ſave my mare:* I was forced "to get my mare charmed for thee." After verdict, upon not guilty pleaded, and found for the plaintiff,

LITTLETON, *Recorder of London*, moved in arreſt of judgment, that none of theſe words are actionable; for the firſt words, "Thou "art a witch," without mentioning that ſhe bewitched any perſon, cattle, or goods, are too general, and no action maintainable for ſpeaking of them; and he cited divers precedents, that for calling one "witch" generally action lies not, if he doth not ſhew what witchcraft ſhe committed.

ALL THE COURT, upon the firſt motion, were of that opinion; and for the ſecond words, "I will make thee ſay, God ſave my "mare," there is not implied any witchcraft: and for the laſt words, "I was inforced to get my mare charmed for thee," was a fault in the plaintiff, who would procure charming, to prevent miſchief to her mare. Wherefore rule was given that the judgment ſhould be ſtaid until, &c.

CASE 2.

King *againſt* Edwards,

Trinity Term, 7. *Car.* 1. *Roll* 992.

If huſband and wife be ſeiſed of lands to them and the heirs of the body of the huſband, with divers remainders over, *he* has an eſtate tail in poſſeſſion, and not a remainder expectant on the *joint eſtate*; and if they join in a feoffment in fee with the third in remainder and levy a fine, it will be a diſcontinuance, notwithſtanding the huſband and thoſe in remainder die without iſſue. Jones, 323. 1. Ro. 632, 3. Ld. Raym. 327. Bull. N. P. 300. Peame, 27, 29. 2. Burr. 712. 3. Bac. Ab. 191. 2. Com. Dig. 564. 3. Com. Dig. 76, 77.

EJECTMENT. Upon a ſpecial verdict the caſe was, *John Boulting* and *Jane* his wife being ſeiſed of the land in queſtion, to them and the heirs of the body of *John Boulting*, remainder to *Edward Boulting* and the heirs of his body, the remainder to *William Boulting* and the heirs of his body, remainder to *George Edwards* and the heirs of his body, the remainder to the right heirs of the ſaid *John Boulting*; they being ſo ſeiſed, the ſaid *John Boulting* and his wife and *William Boulting* (the third in the remainder) joined in a feoffment with warranty to *Mathuſaleh Keen*; and after, the ſaid huſband and wife levied a fine to the ſaid *Keen:* afterwards the ſaid *John Boulting* died without iſſue, and the ſaid *William Boulting* and *Edward Boulting* died without iſſue; and in the fifteenth year of king *James* the ſaid *Mathuſaleh Keen* died, and the land deſcended to *Robert Keen*, who, after the death of the wife of

the

the ſaid *John Boulting*, entered and let to the plaintiff, and the defendant, by the command of the ſaid *George Edwards*, ouſted him.

KING *Againſt* EDWARDS.

The ſole queſtion was, Whether the entry of the ſaid *George Edwards* was lawful? And it was argued by GERMYN, *for the plaintiff*, and by MAYNARD, *for the defendant*.

The FIRST QUESTION was; Whether this feoffment were a diſcontinuance of the eſtate tail? And it was urged for the defendant, that it is not any diſcontinuance; for the huſband during the coverture, having a joint eſtate with his wife in the freehold, had not any eſtate tail in poſſeſſion, but *quaſi* a remainder in tail, expectant upon a joint eſtate for life, and not executed; ſo then, not being ſeiſed of the eſtate tail in poſſeſſion, it cannot make a diſcontinuance: and to prove that he cited *Owen v. Morgans* (*a*), and *Winſcot's Caſe* (*b*).

If land be given to huſband and wife and the heirs of the body of the huſband, and the huſband make a feoffment and die, this is a diſcontinuance.

Jones, 324. 3. Co. 5. 1. Roll. Ab. 632. 2. Roll. Rep 318. 1. Fearne, 4th edit. 42. Cowp. 702.

RICHARDSON, *Chief Juſtice*, BERKLEY, and MYSELF, as to this point, held, that the eſtate tail is in him veſted and ſettled, and that his and his wife's feoffment makes a diſcontinuance: and although it was objected that *William Boulting*, the third in the remainder, joined in the ſaid feoffment, ſo as it could not make a diſcontinuance, but that every of them reſpectively paſſed their eſtates, ALL THE JUSTICES agreed, that this joining of *William* is not material; for there is an intermediate remainder in tail to *Edward Boulting*, which is diſcontinued.

But JONES, *Juſtice*, doubted thereof, and conceived it was not a diſcontinuance, becauſe the huſband was not abſolutely ſeiſed of an eſtate tail during the life of his wife.

THE SECOND OBJECTION was, That if this feoffment were a diſcontinuance at the common law, yet it is taken away as to the wife by the ſtatute of 32. *Hen.* 8. c. 28.: and as it is taken away as to the wife, ſo is it alſo as to thoſe in remainder after the wife, eſpecially the wife ſurviving; and that the fine after the feoffment is but by way of releaſe, and is no ſuch fine as is intended within the ſtatute; for it ought to be ſuch a fine which at the firſt paſſed the eſtate, and not a fine which inures by way of confirmation.

If a huſband make a feoffment of lands whereof he is jointly ſeiſed, and dies, and the wife before entry levies a fine, it fortifies the diſcontinuance created by the feoffment, and neither ſhe nor thoſe in remainder can enter.

But ALL THE JUSTICES agreed, that this feoffment and fine to the ſame perſon make but one aſſurance; and when the wife is barred, and her eſtate deſtroyed by the fine, that ſhe cannot enter, thoſe in remainder may not enter, but are in caſe as they were at the common law: and as this caſe is, they all reſolved, that an expreſs diſcent being found, it takes away his entry. Whereupon, by the aſſent of JONES, without further argument, it was adjudged for the plaintiff.

10. Co. 96. a. 1. Roll. Ab. 634.

JONES, for the firſt point, cited *Worne v. Webſter* (*c*), where it was held by the Court, that it was not any diſcontinuance when the wife ſurvived; but if the huſband had ſurvived, it ſhould have been otherwiſe.

Jones, 324.

(*a*) 3. Co. 5. (*b*) 2. Co. 61. (*c*) Mere, 476.

Sir Richard Snowde *againſt* ———.

CASE 3.

ACTION UPON THE CASE. Whereas one *Chriſtmas* exhibited a bill againſt the plaintiff in the court of chancery, and ſhews what, &c.; and the plaintiff had put in his anſwer thereto,

To accuſe another of having "forſworn himſelf in his anſwer that there

"ſwer to a bill in chantery" is actionable, without alledging the *materiality* of the perjury; were not other bills than the one ſtated. Poſt. 337. 353.

and

Brewer *againſt* Blackman.

and ſhews what, whereunto he was ſworn; that the defendant ſpake theſe words of the plaintiff: "He," *innuendo* the plaintiff, "is forſworn in his anſwer to *Chriſtmas*'s bill," *innuendo* in his anſwer to the ſaid bill. The defendant pleaded not guilty; and it was found againſt him, and damages aſſeſſed to fifty pounds.

2. Roll. Ab. 42. 78. Cro. Eliz. 135. 572. 720. 907. 3. Lev. 166. 2. Com. Dig. 278. Ld. Ray. 259. 2. Term Rep. 69.

BRAMSTON, *Serjeant*, and MR. GRIMSTON, moved in arreſt of judgment: FIRST, That he doth not ſhew in what point he was perjured; for there are divers precedents that indictments of perjury have been quaſhed for this cauſe, that they have not ſhewn the perjury to have been in a point material.—But ALL THE COURT, RICHARDSON, *Chief Juſtice*, abſent, held it to be no good exception: for true it is, that indictments ought to ſhew the cauſe of the perjury; but in an action for words, which is grounded upon the ſpeech of another, it cannot be enlarged further than the other ſpake.

SECONDLY, Becauſe it is not ſaid that he is forſworn in *his* anſwer in chancery, nor is it averred that there is not any other bill nor anſwer but that which is mentioned; and there may be another bill in another place.—*Sed non allocatur:* for when it is ſhewn there was ſuch a bill in chancery, and an anſwer thereto, and that the defendant ſpake thoſe words, and is found by verdict guilty of them upon that occaſion, the action well lies without other averment; for it ſhall not be preſumed there was any bill and anſwer in any other place. Whereupon it was adjudged for the plaintiff.

CASE 4.

Dorothy Brian *againſt* Cockman.

To call a widow a whore, and ſay her children, though born in wedlock, are *baſtards*, is actionable. Ante, 269. 296. 436. 4. Co. 18. 1. Roll. Ab. 35. Hetley, 18. Cro. Eliz. 639. 2. Bulſt. 89. 3. Bulſt. 48. Cro. Jac. 323. 2. Sid. 397. 2. Com. Dig. 285.

ACTION FOR WORDS. Whereas the plaintiff was of good fame, and always free from adultery or fornication and other crimes, and after the death of *Brian* her late huſband was in communication with one *Cowley* for a marriage betwixt them; that the defendant, to deprive her of her fame, and to hinder her from the ſaid marriage, ſpake of the plaintiff theſe words: "She is a whore, "and her children (*innuendo* her children which ſhe had by the "ſaid *Brian* late her huſband) are *Frambiſh*'s baſtards," *innuendo* one *Nicholas Frambiſh*. Upon not guilty, it was found for the plaintiff.

GRIMSTON moved in arreſt of judgment, that theſe words are not actionable: for, for calling "whore" there lies not any action; and to ſay that "her children by her former huſband are *Frambiſh*'s "baſtards," is repugnant in itſelf; for they cannot be baſtards which were born in the time of her former huſband.

But ALL THE COURT held, that the action well lies: for to ſay of a widow who is in communication of marriage with another, that "ſhe played the whore in her former huſband's time," is a great diſcredit; and to ſay that "her children are baſtards" (although in truth they cannot be baſtards in law, yet in reputation they may be ſo), is cauſe of loſs of her marriage, and that none will marry with her. Wherefore it was adjudged for the plaintiff.

Edwards

Edwards *againſt* Woodden.

CASE 5.

Hilary Term, . Car. 1. Roll 602.

REPLEVIN. The defendant made *conuſance* as bailiff to *John Cotton*; for that the place WHERE is twelve acres, parcel of a meadow in *Staunſted*, parcel of the manor of *Staunſted*, of which manor one *George Bing*, *eſq.* was ſeiſed in his *demeſne as of fee*; and ſo ſeiſed by indenture, in the 12. *Jac.* 1. granted a rent-charge of thirty pounds to *Sir Robert Heath* and others in fee iſſuing out of the ſaid manor; and that they, by indenture inrolled within ſix months in the chancery, for three hundred pounds, granted, bargained, and ſold that rent to the ſaid *John Cotton* and his heirs; wherefore for rent arrear at ſuch a Feaſt he made *conuſance*, *&c.* The plaintiff in bar of the *conuſance* confeſſes, that the land is parcel of the manor, and that *George Bing* was ſeiſed of the ſaid manor *in dominico ſuo ut de feodo*, PROUT in the *conuſance*; and that the ſaid *George Bing*, ſo being ſeiſed, granted the ſaid rent to *Sir Robert Heath* and others, PROUT, &c. *Sed quòd diu antea* the ſaid GEORGE BING *aliquid habuit* in the ſaid manor, and long time before the grant of the ſaid rent, one *John Leigh* was ſeiſed in fee of the ſaid manor, *unde*, *&c.*; and ſo ſeiſed, in 5. *Eliz.* deviſed that manor to *Richard Blunt* for one hundred and twenty years, by virtue whereof he entered and was poſſeſſed; and ſo poſſeſſed, 17. *Eliz.* granted the ſame to *Thomas Blunt*, who entered, and in 31. *Eliz.* aſſigned that leaſe to the ſaid *George Bing*, who likewiſe entered and was poſſeſſed; and ſo poſſeſſed, in 37. *Eliz.* aſſigned it to *Henry Bing*; and that he, 22. *Jac.* 1. aſſigned it to *Hammond Claxton*, who entered, and was, and yet is poſſeſſed, and licenced the plaintiff to put in his cattle; who thereupon put in his beaſts, and the defendant diſtrained them, &c. Upon this the defendant demurred, and ſhewed for cauſe:

In replevin, the defendant makes conuſance as bailiff under a ſeiſin in fee of *A.* The plaintiff in bar confeſſes the ſeiſin of *A.* but entitles himſelf under a prior leaſe, by which it appears that *A.* had only the reverſion. This is a good confeſſion and avoidance of the ſeiſin in fee by *A.*; but if it were not a full *confeſſion and avoidance*, it being only a default of *traverſe*, it is aided upon a *general demurrer*.

Yelv. 140. Jones, 402. Dyer, 312. 1. Saund. 207. Ray. 170. 3. Mod. 319. Ld. Ray. 228. 238.

FIRST, That he doth not confeſs or traverſe the grant to *Cotton*.

SECONDLY, That he doth not ſhew how the ſeiſin and grant of the ſaid *George Bing* is avoided.

THIRDLY, Becauſe the plea is repugnant in itſelf.

And now being argued at the bar by ROLLE, *for the defendant*, he ſhewed, that this plea to the *conuſance* is ill, becauſe in the *conuſance* it is pleaded, that *George Bing* was ſeiſed in his demeſne as of fee, and granted that rent, &c.; which is intended as a ſeiſin in fee in poſſeſſion: then when the plaintiff confeſſed that he was ſeiſed *in dominico ſuo ut de feodo prout*, it is a confeſſion of the ſeiſin of the fee in poſſeſſion: and when he afterwards ſhewed a leaſe for years by another, long time before, and that leaſe conveyed to the grantor of the rent, and from him by meſne conveyances to the plaintiff, it may be intended, that the grantor was ſeiſed of the fee in reverſion, and not of the fee in poſſeſſion; for it is not repugnant to the former part of his confeſſion, and it is not a confeſſion of the ſeiſin alledged: wherefore he ought to have traverſed *atſque hoc*, that he was ſeiſed *aliter vel alio modo*, or that he was ſeiſed *modo et*

Edwards *against* Woodden.

et formâ prout: alſo, he doth not ſhew how the fee came to the grantor after the leaſe: alſo, there is not any full confeſſion that the fee was in the grantor, but by argument, which is not good in pleading; and for theſe reaſons it was moved, that the bar to the *conuſance* is ill.

Post. 494.

Richardson, *Chief Juſtice*, and Jones were of that opinion upon the firſt motion.

But I conceived, that the plea is a good confeſſion and avoidance of the ſeiſin in fee alledged, and there needs not any traverſe; for when he entitles himſelf to a leaſe for years precedent, yet *in eſſe*, which is not chargeable with this rent, and allows the reverſion in fee, expectant upon this leaſe, to be in the grantor, the pleading is good; for one ſeiſed in fee of reverſion, expectant upon a leaſe for years, may well ſay that he was ſeiſed *in dominico ſuo ut de feodo*, for of that ſeiſin he may have an aſſiſe; and that this plea is good appears in *Adams v. Wroteſley* (*a*). And to ſhew how he afterwards came to the fee lies not in the conuſance of the plaintiff; but he may well admit it without prejudicing himſelf, he claiming by a precedent eſtate not ſubject to that charge: and to take a *traverſe* when he claims by a former eſtate and admits it, is not neceſſary, and peradventure might be perilous unto him, as 6. *Co.* 12. *Heyler's Caſe.*

Poſt. 581.

Berkley, *Juſtice*, conceived, although ſeiſin is pleaded *in dominico ſuo ut de feodo*, which ſhall be intended ſeiſin in poſſeſſion, as it is pleaded, yet the plea is good in ſubſtance, becauſe he avoids the charge againſt him by reaſon of the former eſtate; and if there be any defect therein, it is only for want of *traverſe*, and that is but form; and not being ſhewn for cauſe, but other cauſes immaterial, it is aided by the 27. *Eliz.* c. . and the defendant ſhall not have advantage thereof.—And to this opinion, for this cauſe, Richardson and Jones ſeemed to incline; but they would adviſe.—*Et adjournatur.*

2. Leon. 44. 80. 3. Mod. 319. Yelv. 151. 2. Saund. 50.

(*a*) Plowd.

Case 6.

John George and his Wife *againſt* Harvey.

Ante, Page 282.

An action will not lie for calling another "a witch," unleſs ſome act of witchcraft be alledged. Ante, 261. 282. Poſt. 474. Cro. Jac. 150. 306. 399. 1. Roll. 45. Moor, 906. 1. Com. Dig. 192.

This Caſe was now moved again by Rolle, *for the plaintiff*, to have judgment, that action lies for theſe words, for ſaying, "She is a witch;" becauſe all kind of witchcraft is puniſhable by 1. *Jac.* 1. c. 12. (*a*), and is intended to be ſuch who hath conference with a ſpirit, and works by ſpirits.

But All the Court *ſeriatim* delivered their opinion, that the action lies not for calling one "witch," without alledging ſhe hath done ſome act; but if it be ſaid that ſhe bewitched any man or any thing, it well lies: but to ſay ſhe is "a witch" generally, is not actionable; for it is a common ſaying, "You are a witch," which may be by your tongue or looks, &c. Wherefore it was adjudged for the defendant. *Vide Hawks v. Auge* (*b*), adjudged accordingly, and *Towſe v. Sand. Mich.* 10. *Jac.* 1.

(*a*) Repealed by 9. Geo. 5. c. 5. ſee 3. Hawk. ch. 4. ſ. 5. (*b*) Cro. Jac. 551.

Tyffyn

Tyffyn *againſt* Wingfield.

CASE 7.

THE record was, "*Queritur in placito tranſgreſſionis pro eò quòd vi* "*et armis cæpit et chaſeavit* his cattle into the cloſe of *J. S.* for "which he took them *damage feſant*, and the plaintiff was inforced "to pay to him forty ſhillings for amends, *per quod* he ſuſtained "damages, &c." After verdict, upon not guilty, and found for the plaintiff,

An action for chaſing cattle into another's cloſe, *whereby* the plaintiff was obliged to pay, &c. need not conclude *contra pacem*, though the bill is "*tranſgreſſionis*," and the declaration "*vi et armis*." Ante, 254. Poſt. 377. 1. Roll. Ab. 100. 2. Roll. Rep. 139. Cro. Jac. 122. 130. Hob. 180. Vaugh. 101. Carth. 66. Salk. 636. 640. 1. Com. Dig. 131. 5. Com. Dig. 351. 4. Bac. Ab. 13.

HENDEN moved in arreſt of judgment, Becauſe he did not conclude *contra pacem, &c.*: for the bill recites, that it is "*placitum tranſ-* "*greſſionis*," and the declaration is, "*vi et armis*;" therefore he ought to conclude *contra pacem*: and becauſe it is not ſo done it is ill in ſubſtance, and not aided by any of the ſtatutes of *Jeofails*.

But GRIMSTON, *for the plaintiff*, argued, that this is an action upon the caſe: for the action is not brought merely for the taking or chaſing of his cattle, but for a ſpecial wrong, *viz.* for chaſing them into another man's ſoil, ſo as they were there treſpaſſers, and he inforced to compound for this damnification: and although it be *vi et armis*, yet that doth not prove it to be an action of treſpaſs; for that may be in an action upon the caſe, as it is in *The Earl of Salop's Caſe*, 9. *Co.* 50. And although the recital of the bill be *in placito tranſgreſſionis*, yet it is not of neceſſity to be treſpaſs only, but may ſerve for treſpaſs upon the caſe.

And ALL THE COURT being of that opinion, it was adjudged for the plaintiff.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

Symonds *againſt* Seabourne.

CASE 8.

Eaſter Term, 8. *Car.* 1. *Roll* .

An action on the caſe may be maintained by a *leſſee for years* for obſtructing the lights of an ancient meſſuage. Cro. Eliz. 128. 1. Sid. 167. Cro. Jac. 373. 1. Vent. 237. 1. Show. 7. Ld. Ray. 392. 4. Burr. 2141. Cowp. 636.

ACTION ON THE CASE. Whereas the plaintiff, upon 9th *October*, 5. *Car.* 1. was poſſeſſed of an ancient houſe in *Worceſter*; and the defendant, the 9th *October*, 5. *Car.* 1. was and yet is poſſeſſed of another houſe and void piece of land adjoining to the north part of the plaintiff's houſe, wherein were three windows, time whereof memory, &c. by which windows the light came out of the ſaid void parcel of land into the plaintiff's houſe, time whereof, &c.; that the ſaid defendant malicioufly, to deprive him of the light coming by the ſaid windows into his houſe, the ſaid 9th *October*, 5. *Car.* 1. erected a building in part of the ſaid void piece, and thereby ſtopped the lights coming by the ſaid windows into his houſe, whereby his houſe is totally darkened, and he much prejudiced by that ſtopping. The defendant pleaded not guilty; and found againſt him.

A declaration that the defendant was and yet is poſſeſſed of a houſe and a void piece of land, and erected buildings thereon, &c. is good. Dougl. 455.

Exception was taken in arreſt of judgment, That the declaration is repugnant in itſelf; for to ſay *adhuc poſſeſſionatus* of the ſaid void piece of land, and to ſhew the offence in erecting a building upon it, ſhews that it is not now a void piece of land.

BERKLEY was of this opinion; but RICHARDSON, JONES, and MYSELF held, that this is good enough, and no repugnancy in the *adhuc poſſeſſionatus*; for it may be that part of the ſaid void parcel of land is builded, and darkens his light, and part remains ſtill void;

SYMONDS *against* SEABOURNE.

A prescription for ancient lights is to the *house* and not the *person*. Post. 419. Cro. Jac. 152. 373.

and the declaration as to that is but surplusage, and the one part well stands with the other.

ANOTHER EXCEPTION, Because he alledgeth not any person in whom the prescription may be fixed; and the plaintiff is but lessee for years, who cannot prescribe. But it was answered thereto, that the "time whereof, &c." is tied to the house, and not to any personal prescription; and being an ancient house and windows therein, time whereof, &c. there need not any prescription in any person.—Wherefore it was adjudged for the plaintiff.

CASE 9.

Baal *against* Baggerley.

Trinity Term, 9. *Car.* 1. *Roll* /.

To say, "Thou "hast forged a "privy seal, and "a commis- "sion," shall be intended to mean "*The* "*king's privy* "*seal*," and "*the* "*king's commis-* "*sion under his* "*privy seal.*"

S.C. Jones, 325. 1. Roll. Ab. 68. 2. Bulst. 137. 1. Lev. 138. 1. Sid. 142. 1. Hawk. P. C. 338.

ACTION FOR WORDS: "Thou hast forged a privy seal "and a commission: Why dost not thou break open thy com- "mission?"

After verdict, upon not guilty pleaded, and found for the plaintiff, it was moved in arrest of judgment, that these words are not actionable: for he did not say *the king's privy seal*, nor any writ under *the* privy seal; and it doth not appear what privy seal he intended: also, he saith not what commission; and the words subsequent, "thy commission," shewed that he intended a commission made by the plaintiff himself.

But it was answered thereto, that by a *privy seal* is intended *the king's privy seal*, and being spoken generally, is to be intended according to the vulgar speech and intendment; and no other seal is meant thereby besides the king's: and "thy commission" is intended a commission which is sued out under the privy seal.

THE COURT seemed to incline to this opinion; but BERKLEY, *Justice*, doubting thereof, the Court would advise.

Afterward it was moved again and argued by PALMER, *for the defendant*, and by CALTHROP, *for the plaintiff*.

PALMER shewed, that these words do not import in themselves that he spake of the king's privy seal, for there is not any inducement that there was any speech of the king's privy seal; and the words in themselves do not import any slander, and they shall not be helped by an intendment or *innuendo*. And it may be, that a private person might have a private seal; and the words after shew the intent of the defendant, when he said "thy commission," *innuendo* the commission of the plaintiff.

CALTHROP thereto answered for the plaintiff, that the words shall be taken according to the vulgar opinion, and as the auditors understand in their usual phrase, which is, that he spake of "the "king's privy seal," when he said "a privy seal;" and when he said "thy commission," it is to be intended "the commission un- "der the privy seal which the plaintiff sued out." And he cited a case in *Trinity Term*, 35. *Eliz.* (*a*) where an action was brought for these words, "Thou hast forged a writing for which thou wast "brought into the star-chamber;" and it was adjudged in the common pleas that the action lies, for they shall be intended such writings for which one shall be punished.

(*a*) Munday *v.* Cordal, Cro. Eliz. 296.

And

And ALL THE COURT *ſeriatim* delivered their opinions, that the action well lies; for the words are ſpoken maliciouſly; and being alledged in the declaration that he ſpake them to ſcandalize him for forging of the privy ſeal and a commiſſion, and being found guilty, it ſhall be intended according to the vulgar interpretation, "*the* "*king's privy ſeal*," the counterfeiting whereof is treaſon (*a*); and a commiſſion ſhall be intended *the king's commiſſion under his privy ſeal*.—BERKLEY, *Juſtice*, agreed with the others. And judgment was given for the plaintiff.

BAAL *againſt* BAGGERLEY.

1. Roll. 68.

(*a*) By 25. Edw. 3. c. 2. and 1. Mary, ſt. 2. c. 6.

Johnſon *againſt* Davy.

CASE 10.

Trinity Term, 9. *Car.* 1. *Roll* 1314.

EJECTMENT of ſix meſſuages, one hundred acres of land, three hundred acres of paſture, &c. Upon not guilty pleaded, the verdict was found for the plaintiff.

In ejectment, if the original writ appear to be of another Term, and between other parties than thoſe in the declaration, it ſhall be intended not the writ on which the plaintiff declared.

GRIMSTON moved in arreſt of judgment, that this ſuit is by original writ, and the original doth not warrant the declaration; for the original is of one meſſuage and ſixty acres of land, and ſo varies from the original in the number of the meſſuages and the land.

But ROLLE, *for the plaintiff*, ſaid, that this ſhall not be intended the original upon which the plaintiff declared; but that there was another original which warrants this declaration, which is now embezzled. And it ſhall not be intended to be grounded upon the writ which is now ſhewn, FIRST, Becauſe the writ bears *teſte* 18th *April*, returnable 15. *Paſchæ*, and this declaration is in *Trinity Term*, and here is no continuance upon this writ: SECONDLY, Becauſe the writ is againſt the defendant and a copyholder; and in this declaration there is no name of the copyholder; wherefore it ſhall be intended that this declaration is grounded upon another writ now wanting; and this want is aided by the ſtatute of *Jeofails*.

Ante, 281. 290, 291.

Hob. 251. 3. Mod. 136. Cro. Jac. 655. 674. 4. Mod. 246. Barnes, 414. 1. Com. Dig. 320. 1. Bac. Ab. 92. *in notis*. Cowp. 455.

And ALL THE COURT, *abſente* RICHARDSON, was of the ſame opinion; and rule given for judgment for the plaintiff.

Penſon *againſt* Gooday.

CASE 11.

Trinity Term, 9. *Car.* 1.

ACTION ON THE CASE. That the defendant maliciouſly and falſly, to deprive him of his life, ſpake theſe words of the plaintiff: "Thou haſt taken out of my pocket forty pounds of my "money, and I will cauſe thee to be indicted at the ſeſſions of the "peace, and to hold up thy hand at the bar for it." *Et ex ulteriori malitiâ* againſt the plaintiff at ſuch a day after, ſaid, "He hath "picked out of my pocket ſilver and gold." After not guilty pleaded, and found for the plaintiff,

Words ſpoken at *different times*, if ſome be actionable and others not, and entire damages given, no judgment can be entered; *ſed aliter* if the words be ſpoken at the *ſame time*, though ſome may not be actionable. Ante, 327.

GRIMSTON moved in arreſt of judgment, that theſe words are not actionable, eſpecially the laſt words; and being ſpoken at ſeveral times, and there lying no action for the laſt words, and damages entire given, the plaintiff ought not to have judgment: and to prove that he cited the caſe of *Oſborn v. Middleton* (*a*).

(*a*) 10. Co. 132. a.

PENSON *against* GODDAY.

And THE WHOLE COURT was of the ſame opinion, that if the words ſpoken at any of the times will not bear an action, and entire damages be given, there ſhall no judgment be entered: and therefore the difference is, when the words are all ſpoken at one time, and part of them are actionable and part not, there damages ſhall be intended to be given only for thoſe words which are actionable; but where words are ſpoken at ſeveral times, and the firſt are actionable, and the other not, and the defendant found guilty of both, and entire damages given, there no judgment ſhall be entered. But in this caſe the firſt words without queſtion are actionable; for he directly charges him with a felonious taking, when he ſaid, "He would cauſe him to be indicted, and to hold up "his hand for that cauſe." And they alſo held, that the laſt words being alledged to be ſpoken *ex ulteriori invidiâ et malitiâ* have reference to the firſt, which is the picking of the pocket before mentioned, and ſo charging him with that felony. It was therefore adjudged for the plaintiff.

Cro. Jac. 115. 143. Cro. Eliz. 788. 1. Roll. Ab. 576. Moor, 142. 708. 10. Co. 131. Hutt. 13. 2. Bac. Ab. 7. 2. Com. Dig. 624, 625. Doug. 3. 7. 730. 3. Term Rep. 433.

CASE 12.

Veſey *againſt* Harris and his Wife.

Hilary Term, 8. Car. 1. Rot.

Scire facias for reſtitution of money recovered on a judgment which was afterwards reverſed. Plea of payment, *abſque hoc*, that he is *adhuc poſſeſſionatus, &c.* The traverſe is on an immaterial point, and bad.

SCIRE FACIAS. Whereas the wife *dum ſola fuit* recovered in the king's bench, in an action on the caſe, 26l. 13s. 4d. for damages and coſts, and had execution of thoſe damages, and yet is thereof poſſeſſed; and whereas afterwards the ſaid judgment was by a writ of error removed into the exchequer chamber, and there reverſed and reſtitution awarded; and afterward ſhe took the ſaid *Harris* to huſband; the plaintiff thereupon brought this writ to have reſtitution.

The defendant pleaded, that after the reverſal had, and before the purchaſe of this writ, he paid to the plaintiff the ſaid debt and coſts of 26l. 13s. 4d. ABSQUE HOC, that they be *poſſeſſionati* of the ſaid money *prout*.

The plaintiff hereupon demurred, becauſe the plea and traverſe are both ill.

And now it was argued at the bar by CALTHROP, *for the plaintiff*, and by GERMYN, *for the defendant*.

S.C. Jones, 326. 4. Leon, 194 Clift. 675. 1. Vent. 211. 217. Cro. Jac. 29. Lut. 328. 382. 3. Lev. 228. Cro. Eliz. 555. Strange, 694. 1. Saund. 268. 1. Cromp. Prac. 364. 4 Bac. Ab. 76 Cowp. 728. 2. Term Rep. 45.

RICHARDSON, *Chief Juſtice*, JONES, and MYSELF held, that the pleading of the payment is ill, becauſe it is grounded and affirmed againſt the record; and a payment being againſt matter of record, cannot be a diſcharge unleſs by matter of record: and as in a *ſcire facias* to have execution payment is no plea in diſcharge thereof, no more is it in a *ſcire facias* to have reſtitution. And it appears by THE YEAR-BOOK 20. *Hen.* 6. *pl.* 24. and 21. *Hen.* 6. *pl.* 15. that it is much doubted whether if "levied by the ſheriff upon a *fieri* "*facias*" be good plea; and at length it was ruled to be good, becauſe it is grounded upon the *fieri facias* awarded, which he cannot withſtand; and in reaſon therefore it ſhould then be allowed (*a*), *à multo fortiori*, a bare payment is no plea: and if it be a plea, yet as it is pleaded, it is not good; for he doth not rely upon it, but traverſeth that which is immaterial (*a*), viz. *abſque hoc*, that he is *poſſeſſionatus, &c.* which was idly alledged, and not materials or traverſable; and by his traverſe he waives his pleading of the payment,

(*a*) By 4. & 5. Ann. c. 16. no exception ſhall be taken to an immaterial traverſe unleſs ſhewn for cauſe of demurrer.

ment, which being ſpecially ſhewn for cauſe of demurrer, the demurrer is good, and judgment ſhall be againſt the defendant. VESEY *againſt* HARRIS and his WIFE.

BERKLEY, *Juſtice*, held, that payment had been a good plea, if he had relied thereupon, becauſe he avers that thereby the party is ſatisfied: and in divers caſes matter in fact may be pleaded in diſcharge; as in debt upon an eſcape, he may plead, that the plaintiff commanded him to let him out of execution, and ſuch like, &c. But as to the traverſe, he conceived it ill, and therefore agreed with the other Juſtices, that judgment ſhould be given for the plaintiff; and it was adjudged accordingly.

Penſon and Anne his Wife *againſt* Gooday. CASE 13.

Trinity Term, 9. *Car.* 1. *Roll* .

ACTION ON THE CASE. Whereas he keepeth an alehouſe, being *debito modo licentiatus* by juſtices of the peace; that the defendant, to ſcandalize the plaintiff's wife, ſpake theſe words of her: "Hang thee, bawd," *innuendo* the ſaid wife; "thou," the ſaid *Anne innuendo*, "art worſe than a bawd; thou keepeſt an houſe," *meſſuagium prædictum innuendo*, "worſe than a bawdy-houſe; and "thou keepeſt a whore in thy houſe to pull out my throat." Upon not guilty pleaded, it was found for the plaintiff.

STONE moved in arreſt of judgment, that theſe words are not actionable; but agreed, that for ſaying one is "a bawd, and keeps "a bawdy-houſe," action lies, becauſe it is a temporal offence, for which the common law inflicts puniſhment: but to call one "bawd" without further ſpeaking, an action lies not, no more than to call one "whore," which is a defamation only puniſhable in the ſpiritual court: and to ſay, that "he keeps a houſe worſe "than a bawdy-houſe," hath not any plain intendment what he meant thereby; wherefore the action lies not: and if it be intended that ſuch words ſhould hinder gueſts from coming thither, being an alehouſe, the huſband only ought to have brought the action.

And as to that THE COURT, *abſente* RICHARDSON, agreed: but for the other words they held, that the action lies by the huſband and wife for the ſlander to his wife; and it is as much as if he had ſaid, that ſhe keepeth a bawdy-houſe. Wherefore it was adjudged for the plaintiff.

An action lies by huſband and wife for ſaying of the wife, "Hang thee, "bawd; thou "art worſe than "a bawd; thou "keepeſt a houſe "worſe than a "bawdy-houſe; "and thou keep-"eſt a whore in "thy houſe to "pull out my "throat."
Ante, 229.
Poſt. 394.
1. Roll. Ab. 68.
Cro. Jac. 462.
1. Mod. 31.
1. Sid. 438.
1. Vent. 53.
2. Keb. 589.
Cro. Eliz. 229. 261.
1. Ld. Ray. 710.
2. Ld. Ray. 1004.
2. Stra. 1169.
1. Hawk. P. C. 357.

George Minn *againſt* Anthony Hynton, Bailiff of the Liberty of the Dean and Chapter of Weſtminſter. CASE 14.

In Chancery.

THE plaintiff declares as *clerk of the hamper* in an action upon the caſe. Whereas one *Robert Treſwell*, 16th *February*, 4. *Car.* 1. was bound to him in an obligation of 100l. which was not paid; and whereas he, for the obtaining of the ſaid debt, 12th *March*, 5. *Car.* 1. being clerk of the hamper in chancery, proſecuted *an attachment of privilege*, directed to the ſheriff of *Middleſex*, to attach his body, returnable 15. *Paſch.* in chancery, *ad reſpond.* the ſaid GEORGE MINN *in placito tranſgreſſionis*, which writ he proſecuted

An officer of the court of *chancery* cannot hold a perſon to bail on an *attachment of privilege* in treſpaſs, with an intention to declare againſt him in *debt*.
See Tidd, 193. 3. Term Rep. 662.

MINN *againſt* HYNTON.

eâ intentione, that the ſaid *Robert Treſwell* ſo being arreſted upon his appearance, ſhould put in good bail to anſwer him to his ſaid bill by him to be put in for the recovery of his ſaid debt upon the ſaid obligation; which writ afterward, *viz.* 13th *March*, 5. *Car.* 1. was delivered to the ſheriffs of *Middleſex* to execute; and that they the ſame day directed their warrants under their ſeals to the bailiff of the liberty of the dean and chapter of *Weſtminſter* to arreſt him; which warrant, 14th *March*, 5. *Car.* 1. was delivered to the defendant, bailiff of the ſaid liberty, to execute; and that he by virtue of the ſaid warrant at *Weſtminſter*, within the ſaid liberty, upon the 25th *March*, 5. *Car.* 1. arreſted the ſaid *Robert Treſwell*, and had him in his cuſtody; and that afterwards, before the return of the writ, *viz.* 8th *April*, 6. *Car.* 1. to delay the plaintiff of his ſuit, and to defraud him of the recovery of his debt, let him out of his cuſtody and to go at large againſt the plaintiff's will, and had not his body at the day; and that afterward *ſe eloinavit*; and becauſe he is delayed in his ſuit and loſeth his debt, &c.

The defendant pleads thereto, that the ſaid *Robert Treſwell* found ſureties for his appearance *Arthur Squibb* and *J. W.*; and at the day of the return of the writ the defendant returned "*cepi corpus*;" and that before the *habeas corpus* to bring him to the bar, he the ſaid *Robert Treſwell* died. *Et hoc, &c.* The plaintiff replies, that he did not take the ſaid *Arthur Squibb* and *J. W.* ſureties for his appearance *modo et formâ*: and hereupon it was demurred.

And this was referred to JUSTICE JONES, JUSTICE BERKLEY, and to MYSELF, to conſider of this demurrer; and after argument, by counſel on both ſides, we reſolved, that this declaration was not good.

An action againſt a *bailiff* for an eſcape muſt ſhew of what *liberty* he was bailiff, and that he had the execution of writs. 2. Term Rep. 5.

FIRST, Becauſe he doth not ſay of what liberty he is bailiff, or whether he hath execution and return of writs; otherwiſe there is no colour to charge him, and therefore ought to be ſpecially ſhewn. And of this opinion was JONES; and I agreed with him: but BERKLEY doubted thereof, becauſe being bailiff of a liberty, it cannot be intended another liberty; and he admits it in his plea, by making him a warrant to arreſt.

In the *king's bench*, when defendant is committed to the marſhal, or has put in bail, the plaintiff or any other may declare againſt him in whatever action he pleaſes, 2. Inſt. 23. 4. Inſt. 72. 2. 3. Bl. Com. 285.

SECONDLY, Becauſe he alledges that he had *an attachment of privilege* to arreſt him for *treſpaſs*, intending after his appearance to declare *in debt*; which cannot be: for it is abuſing the proceſs of the court; nor can it be ſo in any court but in the king's bench: and there the reaſon is, becauſe when he appears and puts in bail, he is ſuppoſed to be *in cuſtodiâ mareſchalli*, and declares againſt him *in cuſtodiâ, &c.*; but ſo it is not in any other court (*a*).—Wherefore THEY ALL HELD, that the declaration for this cauſe was not good, and that judgment ought to be againſt the plaintiff: and ſo we certified that the declaration was ill, and the cauſes wherefore.

Bulſt. 207. Hob. 267. Cro. Jac. 450. 620. Godb. 339. 1. Salk. 352. Cowp. 455. But ſee Tidd's Practice, 136. 193.

CASE 15.

Bawderok *againſt* Mackaller.

Information *qui tam* for more than the penalty, or after the time limited, though bad for the informer, is good for the king.

INFORMATION, upon the 31. *Eliz.* c. 6. of ſimony, for the king and himſelf; ſuppoſing the church in the *Tower* of *London* to be a benefice with cure of the annual value of 6l. 13s. 4d. grant-

able

able by the king, and that one SUCH was parſon, and reſigned; and that afterwards the defendant agreed with *J. S.* to give him twenty pounds if he might procure him to be preſented thereto by the king, and admitted and inducted: and alledges in fact, that he procured the king to give unto him the ſaid preſentation to the ſaid chapel, and that he was admitted, inſtituted, and inducted thereto; and therefore he demanded 6l. 13s. 4d. being the double value, *ſecundum formam ſtatuti, &c.* Upon not guilty pleaded, and found for the plaintiff,

BAWDEROK *againſt* MACKALLER.

Cro. Jac. 365. 499. And. 127. Moor, 564. Cro. Eliz. 583. 11. Co. 66. 2. Mod. 267. 2. Bl. Rep. 792. 2. Hawk. P. C. 380. 386. 4. Bl. Com. 62.

HENDEN, *Serjeant*, moved in arreſt of judgment: FIRST, That this information is not good, becauſe he ſhews the annual value to be 6l. 13s. 4d. and the ſtatute is that he ſhall forfeit a double value, and yet demands 6l. 13s. 4d. as being the double value; whereas it appears it is not, and therefore it is ill.—*Sed non allocatur:* for the truth of the offence being ſhewn, and found againſt him, although he demands leſs than he ought, yet the information is good for the king: and it was compared to the caſe of *Agard v. Candiſh* (*a*), which was adjudged in the exchequer, where an information was brought for him and the king upon the ſtatute of liveries; and it was brought after the year, which is not good for the party, by the expreſs words of the ſtatute, yet it was good for the king, and judgment entered.

(*a*) 2. Danv. 283. Cro. Eliz. 326. Moor, 564. 2. And. 127. Sav. 134.

SECONDLY, It was moved, that this being a donative of the king's donation, is not within the ſtatute of 31. *Eliz.* c. 6. for that mentions only where one comes in by ſimony, by preſentation, or collation, &c.—*Sed non allocatur*; becauſe it is within an equal miſchief, againſt which the ſtatute provides, and ſo within the remedy thereof.

A *donative* is within the 31. *Eliz.* c. 6. againſt *ſimony*, although in the king's gift, and he preſent the incumbent; for ſimony may be committed without the patron's privity. 3. Com. Dig. 126.

THIRDLY, It was objected, that this could not be within the ſtatute, becauſe the king being donor, it cannot be intended that he preſented for ſimony; and the ſtatute is, that the patron ſhall loſe his preſentation for that time, and the king is to have it; therefore it ſhall not extend to any of the king's donations.—*Sed non allocatur:* for ſimony may be by compact betwixt ſtrangers, without the privity of the incumbent or patron, and yet within the purview of the ſtatute; as it was adjudged in *Calver's Caſe* in the exchequer, as JONES cited it, where the father of the incumbent contracted with the patron's wife, to give her one hundred pounds if the patron would preſent his ſon, the patron or incumbent not knowing of this contract (as it was found by ſpecial verdict); yet this was held to be within the ſtatute: ſo here, he giving to a ſtranger 26l. &c. is within the ſtatute. Whereupon rule was given, that judgment ſhould be entered for the plaintiff.

A corrupt contract for procuring a preſentation to a benefice, although neither *patron* nor *incumbent* be privy to it, is *ſimony*. Poſt. 425. Cro. Jac. 385. 533. 3. Lev. 337. Lane, 73. Cro. Eliz. 788.

See 12. Ann. c. 12.

Chedley's Caſe.

CASE 16.

CHEDLEY being indicted in the grand ſeſſions at *Angleſea*, in *Wales*, for petty treaſon, a *certiorari* was prayed to remove the indictment, and have it tried in an adjoining county; and THE COURT being moved concerning their opinions how it might be

A certiorari is grantable to the grand ſeſſions in Wales, to remove an indictments of petty treaſon, for the purpoſe of trying it in an adjoining county. Ante, 248.—1. Roll. Ab. 304.

CRESLEY'S CASE.

1. Hale, 158. Cro. Jac. 484. 8. Mod. 135. 1. Salk. 146. Strange, 104. 553. 704. Wilſon, 320. Atk. 175. 182. Cowper, 751. 2. Burr. 835. 3. Ter. Rep. 658.

tried in any other county, doubted thereof: but it appears by divers precedents, that a *certiorari* hath been awarded in ſuch caſes into *Wales*, by reaſon of the ſtatute of 26. *Hen.* 8. c. 6. which allows that indictments in caſes of felony may be enquired in the adjoining counties. And JONES ſaid, that in 32. *Eliz.* ſuch a *certiorari* was granted upon debate. Wherefore the Court awarded a *certiorari*: and they ſaid, when the record was removed they would adviſe how it ſhould be tried. But afterwards it was ſtayed, and appointed to be argued, whether a *certiorari* were grantable.

4. Burr. 2457. Douglas, 751. 2. Hawk. P. C. ch. 27. ſ. 25. 5. Com. Dig. 666.

CASE 17.

Penetration muſt be proved on an indictment for a rape; and on acquittal for this defect, the offender may be indicted for the miſdemeanour.

1. Hawk. P. C. 170. 2. Hawk. P. C. 625. 3. Burr. 1696.

Martyn Page's Caſe.

MARTYN PAGE was indicted at *Newgate* ſeſſions, for that *carnaliter cognovit* one *A. W.* an infant under the age of ten years (*a*); and becauſe upon evidence to the jury at his arraignment it was not proved that he entered into the child's body (but the contrary), although he very much had abuſed her, the jury would not find him guilty of the felony: whereupon, by advice of JUSTICE JONES and JUSTICE BERKLEY, who heard the evidence, and conceived it a foul fact, and fit to be puniſhed, an indictment of battery for abuſing the ſaid infant in lying with her was preferred and found; and he was thereupon tried this Term at the bar, and being found guilty, was adjudged for the miſdemeanour to be committed to priſon, there to abide during the king's pleaſure, to be fined two hundred marks, to ſtand upon the pillory in *Chancery-lane, in Middleſex*, near the place where the fact was committed, with a paper upon his head ſignifying the cauſe, and to be bound with able ſureties to the good behaviour during life.

(*a*) See 18. Eliz. c. 7.

CASE 18.

Threatening to "*kill the king*," provided the perſon afterwards come to England *for that purpoſe*, is an overt act of treaſon within 25. *Edw.* 3. c. 2. Ante, 125.

Dyer, 298. 3. Inſt. 11. Co. Lit. 261. b. 1. Hale, 116. Kely. 11. 4 St. Tr. 635. Foſter, 202.

Arthur Crohagan's Caſe.

ARTHUR CROHAGAN, an *Iriſhman*, was arraigned the ſame day, *viz.* 25th *November*, of treaſon, for that he being the king's ſubject, upon the ninth of *July*, 7. *Car.* 1. *regis nunc*, at *Liſbon*, in *Spain*, uſed theſe words: "I will kill the king" (*innuendo dominum Carolum regem Angliæ*) "if I may come to him;" and that in *Auguſt*, 9. *Car.* 1. he came into *England* for the ſame purpoſe.

To this he pleaded not guilty, and was tried by a jury of *Middleſex*; and it was directly proved by *Wheeler* and *Eleſey*, two merchants, that he ſpake thoſe words on ſhipboard at *Liſbon*, in *Spain*, in great heat of ſpeech with *Captain Baſk*, and added theſe words, "becauſe he is an heretic."

And for that his traitorous intent and the imagination of his heart is declared by theſe words, IT WAS HELD high-treaſon by the courſe of the common law, and within the expreſs words of the ſtatute of 25. *Edw.* 3. c. 2.

And he coming into *England* in *Auguſt* laſt, and being arreſted by a warrant for this cauſe, moſt inſolently put his finger into his mouth, and ſcornfully pulling it out, ſaid, "I care not this for "your king, &c.;" all which ſpeeches and actions, though he now denied them, yet the jury found him guilty: whereupon he had judgment accordingly. He confeſſed that he was a Dominican friar, and made prieſt in *Spain*; and although this, and his returning into

into *England* to ſeduce the liege people, were treaſon by the ſtatute of 23. *Eliz.* c. . yet the king's attorney ſaid, he would not proceed againſt him for that cauſe, but upon the ſtatute of 25. *Edw.* 3. c. 2. of treaſon. CRONAGAN's CASE.

Thomas Adams *againſt* Lord Warden of the Stanneries. CASE 19.

THOMAS ADAMS, by NOY, the king's attorney, prayed a prohibition againſt *The Lord Warden of the Stanneries* in *Cornwall*, and his deputy there, and againſt *Richard Adams* and others, for that they procured an order and decree for the payment of a ſum of money unto them, without any bill and ſummoning the defendant to appear, and without any anſwer or ſentence of Court; ſo the proceedings were *coram non judice*. And NOY ſaid, all their proceedings there ſummarily, *et de plano*, without any formal courſe, were illegal, and the king's courts ſhall take notice where they proceeded irregularly, and ſhall controul them, and preſerve the juriſdiction of the court: and he further ſaid, that the juriſdiction of the ſtanneries (*a*) is only for tin matters, and where the perſons which ſue, or the one of them, be a tinner (*b*).—Whereupon a prohibition, compriſing all this matter, was drawn and granted accordingly.

A prohibition granted to the *Stannaries*, on a ſuggeſtion that their proceedings were repugnant to the rules of juſtice.

4. Inſt. 229, 231. Roll. Ab. 547. 12. Co. 20. 3. Bulſt. 283. 2. Roll. Rep. 379. 1. Bac. Ab. 652. Cowp. 424.

(*a*) *Vide* 16. Car. 1. c. 15. which declares their privileges; and a treatiſe on their laws, publiſhed by authority at Truro, 13th September, 27. Geo. 2. 1. vol. 8vo.

(*b*) 7. Mod. 103. 2. Vern. 483.

Swayn *againſt* Stephens. CASE 20.

Ante, Page 245.

THIS Caſe was now moved by CALTHROP, *for the plaintiff* (none being there *for the defendant*).

Trover is within the ſtatute of limitations.

2. Saund. 120. 2. Mod. 71. Stra. 556. 1171. 3. Bac. Ab. 513.

FIRST, That an action of trover is not within the ſtatute of limitations of 21. *Jac.* 1, c. 16.—But ALL THE COURT *una voce* over-ruled it: for although it be not particularly mentioned in the clauſe of limitations, yet it is under the general words of actions upon the caſe; and it appears expreſsly, that it is ſo intended by the laſt proviſo in the ſtatute, wherein action of trover is eſpecially mentioned.

The exception in the 21. *Jac.* 1. c. 16. as to perſons being beyond ſeas, extends only to *creditors*, and not to *debtors*.

1. Lev. 143. 3. Mod. 312. Prec. Cha. 385.

A SECOND QUESTION was, The defendant being beyond ſeas at the time when the ſtatute was made, and until *primo Caroli*, Whether the plaintiff is to be relieved by the equity of the ſtatute, although he be not within the expreſs words of the laſt proviſo? for that provides only where the plaintiff is over the ſea, to have his action when he returns, if he brings his action within the year after his return; but there is no mention, when the defendant is over the ſeas, of enlarging the time (*a*). And it was ſtrongly

Show. 99. 6. Mod. 26. 2. Vern. 694. Wilſ. 134. Salk. 425. Fitz. 171. 289.

(*a*) But now by 4. Ann. c. 16. if any perſon againſt whom an action lies by 21. Jac. 1 c. 16. was beyond ſea at the time that the cauſe of ſuch action accrued, the plaintiff may bring his action within the ſame time after his return as is limited for ſuch action by the 21. Jac. 1, c. 16.

urged

SWAYN *againſt* STEPHENS.

Ante, 246.

urged by GRIMSTON, *for the plaintiff*, that he is within the equity of the ſaid proviſo; for it would be *inutilis et ſtultus labor* to ſue one to outlawry being beyond ſeas, when it is erroneous and reverſable at his return.—JONES and BERKLEY, *Juſtices*, were of that opinion, that the defendant being beyond ſea, is within the equity and intention of the ſtatute, as well as where the plaintiff is beyond ſeas.—RICHARDSON, *Chief Juſtice*, doubted thereof, and ſaid, that he would not deliver any opinion: but I conceived, that the defendant being beyond ſeas, is not within the equity of the ſtatute; for the ſtatute provided remedy where the plaintiff is over ſeas, and omitting where the defendant, &c. did it purpoſely, and never intended to provide any remedy for him, becauſe the plaintiff may proſecute his ſuit by original, although the defendant be beyond ſeas, unto an outlawry; which will ſhew there was not any remiſſneſs in him, which is the matter which the law intends, and that there ſhould be a freſh proſecution: and when the defendant reverſeth the outlawry, the plaintiff ſhall then know where he is to proſecute the ſuit againſt him; ſo the firſt original is not merely a fruitleſs and idle labour, but thereby preſerves his action.

A *replication* varying from the *count* upon any immaterial point is no departure. Ante, 76. 246. 257. 1. Lev. 110. 143. Strange, 21. 806. Fort. 375. 5. Com. Dig. 59. 102.

THIRDLY, For the departure from the declaration, &c. RICHARDSON, JONES, and BERKLEY, held, that the replication is no departure, but is purſuant to the count, and fortifies it: but *I* conceived it was a departure, becauſe it varies in the matter and in the time; for the declaration ſuppoſeth a poſſeſſion of the goods, and that 1ſt *March*, 21. *Jac.* 1. he loſt them, and the ſame day the defendant found them, and the 1ſt *October*, 3. *Car.* 1. converted them: and the plaintiff in his replication ſhews, that he, the ſaid 1ſt *March*, 19 *Jac.* 1. delivered them to the defendant to tranſport unto *T.* in *Spain*, and to re-deliver them upon requeſt; and after ſhews, that the defendant, 21ſt *March*, 19. *Jac.* 1. at *St. T.* ſold and converted them to his own uſe; ſo it varies in the point how the goods came to the defendant's hands, both for the matter and time.

In trover for a ſhip and goods, if it be alledged that the plaintiff *ſold* them beyond ſea; that he returned on ſuch a day; and that after, on demand made, he refuſed to *deliver them*, it ſhall be intended that they came a *ſecond time* to the defendant's hands. 2. Term Rep. 462.

FOURTHLY, They held, when it is alledged that the defendant returned from beyond ſeas 1. *Car.* 1. and that the plaintiff 3. *Car.* 1. required the re-delivery, and he refuſed; and afterward, the ſame 1ſt *October*, 3. *Car.* 1. converted them to his proper uſe; it ſhall be intended, that the ſaid goods came a ſecond time to the defendant's hands; and that they being in his hands, the plaintiff required the delivery of them; and that afterwards the ſame day he converted them, and that upon this converſion the plaintiff had grounded his action, and the plaintiff had election upon which converſion he would bring his action; and then he is clearly out of the ſaid ſtatute of 21. *Jac.* 1. c. , the action being brought within two years after the laſt converſion, and ſo well brought. But *I* doubted how this action ſhould be maintained, without ſhewing how they came to the defendant's hands, where it is allowed, that once he ſold them in 19. *Jac.* 1. and converted the money to his proper uſe; and the allegation, that he after refuſed to deliver, and converted them to his proper uſe, without ſhewing how he came to them, cannot be good. But THE OTHER THREE JUSTICES being againſt me, they gave rule, that judgment ſhould be entered for the plaintiff, unleſs, &c.

Dike

Dike *againſt* Ricks.

CASE 21.

Hilary Term, 8. Car. 1. Roll 704.

REPLEVIN. The defendant *avows*, for that the place WHERE, &c. is fourteen acres of land in *Edmonton*, whereof *diu ante*, *&c.* one *Jerome Sugar* was ſeiſed in fee, and held them in ſocage, and deviſed them to *Elizabeth* his wife for her life, and died; that the reverſion deſcended to *Jerome Sugar* his ſon and heir, and he died ſeiſed of the reverſion, which deſcended to *Anne* his ſiſter, wife of the ſaid *Ricks*; that the ſaid *Elizabeth* died, and the ſaid *William Ricks* and *Anne* entered, and by the indenture let thoſe lands to *John Fenn* for one-and-twenty years, rendering ten pounds yearly rent, and he entered: and for the rent of half-a-year, due at the *Annunciation* laſt paſt, he avows. The plaintiff, in bar to this avowry, confeſſeth the ſeiſin of *Jerome Sugar* the father, and the tenure and deviſe to *Elizabeth* for her life, *prout*, *&c.* but he further ſaith, that *he* by the ſaid will appointed the ſaid *Elizabeth* his executrix; and further deviſed and appointed, that if in caſe it ſhould fully and ſufficiently appear, that the ſaid *Elizabeth* ſhould not find ſufficient of the goods, chattels, and debts, due to the ſaid *Jerome* the teſtator to ſatisfy his debts, and to maintain the ſaid *Elizabeth* and her children, that then ſhe ſhould ſell all the ſaid tenement, or ſo much as, with his goods and debts owing him, would ſatisfy his debts and maintain her and her children: and he alledgeth, that in 43. *Eliz.* it ſufficiently appeared to the ſaid *Elizabeth*, that the ſaid *Jerome* had not at the time of his death goods, chattels, and debts owing him ſufficient to ſatisfy his the ſaid *Jerome*'s debts, and to maintain the ſaid *Elizabeth* and her children; wherefore ſhe, by indenture inrolled in chancery within ſix months, for 160l. bargained and ſold the ſaid tenement to *William Sugar* and his heirs, by virtue of which bargain and ſale, and by the *ſtatute* 27. *Hen.* 8. c. 10. *of Uſes*, the ſaid *William Sugar* was ſeiſed in fee, and afterward *Jerome* the ſon releaſed unto him and his heirs, who by fine conveyed it to the plaintiff; and TRAVERSETH that the ſaid *Jerome* the ſon died ſeiſed of the reverſion. The avowant thereupon demurred.

If *A.* deviſes land to *B.* his wife for life, and alſo wills, that if it ſhall appear that there are not ſufficient aſſets to pay his debts, that then *B.* ſhall have power to ſell ſo much of the land as will pay the debts, *B.* may immediately ſell ſo much of the land as is neceſſary for the purpoſe; for this is a *condition precedent.*

S.C. Jones, 327. 1. Roll. Ab. 329. 415. Cro. Eliz. 219. Cowp. 43.

And now being argued at the bar by GRIMSTON, it was adjudged for the defendant, that the plea to the avowry was not good:

FIRST, Becauſe he doth not ſhew what was the value of the goods and debts due to the teſtator, and what was the ſum of the debts which he owed, and what was the value of the lands ſold, ſo as it might appear to the Court that ſhe had cauſe of ſale of the whole land, for ſhe had authority only to ſell as much as ſhould ſuffice, &c.

SECONDLY, For that the will giving the authority to ſell, and he pleading a ſale by indenture of bargain and ſale inrolled, and that by virtue thereof, and of the ſtatute of 27. *Hen.* 8. c. 10. of Uſes, he was ſeiſed of the reverſion, &c. it is not good; for if the ſale be good by the authority of the will, he is not in by the ſtatute, but by the deviſe: and where it was ſaid, that this ſale ſhall be

If an inducement to a *traverſe* ſhews a defective title, the inducement is bad. Poſt. 442.

Jones, 328. Yelv. 225. 1. Saund. 268. Salk. 520.

DIKE *againſt* RICKS.

be *quoad* the eſtate for life only which is transferred by the ſtatute, and the reverſion was conveyed by the will, it was held, that when ſhe took upon her to ſell, ſhe ſold the entire eſtate and inheritance of the land wherein the eſtate for life is contained, and ſhe did not by authority of the will convey the reverſion only expectant upon the eſtate for life. And JONES ſaid, that in 22. *Jac.* 1. in *Davie v. Urber*, both theſe points were adjudged accordingly.

Co. Lit. 113. a. 1. Roll. Ab. 329. 2. Burr. 1029.

A releaſe to a leſſee for years, without ſaying "to him and his heirs," doth not enlarge the eſtate.

THIRDLY, It was held, that the pleading of the releaſe is to no purpoſe, becauſe although the releaſe be *by* him and his heirs, yet it is not a releaſe *to* him and his heirs; and when by the bargain and ſale the eſtate for life of the leſſee only paſſed, this releaſe doth not enlarge it to increaſe the eſtate.

— Co. Lit. 273. 291. Jenk. 200. Jones, 328. Dyer, 265. Cowp. 599.

An inducement to a traverſe muſt always be ſufficient in ſubſtance. Ante, 266. Poſt. 442.

FOURTHLY, Where it was alledged, that this plea is an inducement to the traverſe, and therefore not iſſuable, and then there needs not ſo much certainty as where the matter is iſſuable, yet THE COURT held, that the plea is not good; for *an inducement to a traverſe ought always to be ſufficient in matter*, which is not here. Wherefore it was adjudged for the avowant.

2. Leon. 32. 4. Bac. Ab. 68. 5. Com. Dig. 121.

CASE 22.

—— *againſt* The Inhabitants of the Hundred of ——.

A maſter may maintain an action in his own name on the ſtatute of Hue and Cry for a robbery committed on his ſervant, and the ſervant ſhall be ſworn. Ante, 38. 256. 3. Cro. 142. Hob. 327.

ERROR of a judgment in the common pleas in an action on the ſtatute of *Winton* of HUE AND CRY.

The error aſſigned was, Becauſe the maſter brought the action for a robbery committed upon his ſervant, and the ſervant was ſworn WHERE, &c.

CALTHROP objected, that the maſter who had the loſs ought to be ſworn.

GRIMSTON thereto anſwered, that the ſervant ought to be ſworn and not the maſter; for although the loſs is to the maſter when a ſervant is robbed of his money, yet the ſervant, upon whom the robbery was committed, is the proper perſon to be ſworn that he was robbed, and that he knew not any of the robbers.

In an action *qui tam* on the ſtatute HUE AND CRY, the *qui tam pro domino rege* need not be mentioned in either the *iſſue* or *venire facias*; for the king is only to have his fine. Ante, 11. 256. 3. Lev. 375. 1. Com. Dig. 220. Co. Ent. 160. 348. 2. Hawk. P. C. 305.

THE SECOND ERROR inſiſted upon was, Becauſe the action is brought by the party and the king, yet neither upon the joining iſſue nor in the *venire facias* is there any mention of QUI TAM *pro domino rege, &c.* but of the party himſelf only.—*Sed non allocatur:* for it was ſaid, that true it is, when the action is brought upon a penal ſtatute, where part is given to the king and part to the party proſecuting, there it ought to be ſo, and it is the common courſe to enter the party QUI TAM *pro, &c.* But when the king is only named as an offence againſt the king and the party, and the king is not to have any part of the ſum recovered, but only to have a fine, there neither in the iſſue nor in the *venire facias* is any mention of QUI TAM, &c. and ſo are all the precedents, as KEELING affirmed.

And ALL THE COURT was of that opinion; whereupon rule was given, that judgment ſhould be affirmed.

Anonymous.

Anonymous.

CASE 23.

ACTION UPON THE CASE, for theſe words: "Thou haſt "given *J. S.* nine pounds for forſwearing himſelf in chan- "cery, and haſt hired him to forge a bond." After verdict upon not guilty pleaded, and found for the plaintiff,

It is actionable to accuſe a man of having paid money to another as hire to forſwear himſelf in chancery; and it is not neceſſary to ſtate that he did forſwear himſelf. Ante, 140. 322. Cro. Jac. 158. Moor, 186. 1. Hawk. P.C. 345.

MALLET, *the Queen's Solicitor*, and HOLBOURN, moved in arreſt of judgment, that theſe words are not actionable; for it is not alledged (as to the firſt words), that any ſuit was in the chancery, or that he forſwore himſelf in his anſwer or as a witneſs. Nor doth he ſay, that he ſuborned him to forſwear, nor that he gave that unto him to forſwear himſelf, nor that he knew that he forſwore himſelf, nor doth ſhew any particular wherein he forſwore himſelf. And to ſay, that he gave unto him nine pounds for forſwearing himſelf, may be intended, that he was inforced to pay it by reaſon of his falſe oath.

Sed non allocantur: for the words are to be intended according to the uſual manner of ſpeaking, that he hired him to forſwear himſelf: and although he doth not ſhew that he was ſworn in chancery, nor what he ſwore, it is not material; for if he never was ſworn, it is ſcandalous unto him to ſay, "that he procured "one to forſwear himſelf in a court of record," although it is merely falſe becauſe he never was ſworn. SECONDLY, To the words, that "he had hired him to forge a bond," although it is not ſaid that he hath forged a bond, or that it appears he hath done the act, it is ſcandalous. And ſo held ALL THE COURT; wherefore it was adjudged for the plaintiff.

Mackaller *againſt* Todderick.

CASE 24.

ERROR of a judgment in the court of the *Tower* of *London* in *aſſumpſit*, where the plaintiff declared, that the defendant promiſed him, in conſideration that he would procure the ſaid *Mackaller* to be preſented and inſtituted to the chapel of the *Tower*, being a donative in the king's gift, &c. to pay to him twenty pounds upon requeſt. The plaintiff alledgeth in fact, that by his labour and means the king preſented the ſaid *Mackaller* to the ſaid chapel, and he was admitted, inſtituted, and inducted into it; and that he required the payment of the ſaid twenty pounds at ſuch a day, &c. and the defendant had not paid it. The defendant pleaded *non aſſumpſit*; and verdict and judgment for the plaintiff.

A promiſe to procure a perſon to be inſtituted to a chapel in conſideration of twenty pounds is ſimoniacal and void. Poſt. 353. 361. 1. Lutw. 346. 1. Roll. Ab. 18. 1. Bac. Ab. 475. Cowp. 39.

And now error brought. The error aſſigned, that judgment was given for the plaintiff, where it ought to be for the defendant.

FLETCHER, for the plaintiff in the writ of error, moved, that this judgment was erroneous, becauſe he declares upon a promiſe grounded on a conſideration againſt law, and that being the only conſideration the *aſſumpſit* is void; and for that relied upon *Onely's Caſe*, 19. *Eliz. Dyer et* 3. *Co.—Et adjournatur* (*a*).

(*a*) It was moved again in *Huary* and *Eaſter Terms*, and, after argument at the bar, THE COURT was of opinion, that the conſideration was had, and that the action would not lie; but the judgment was reverſed for a faul. in the declaration. Poſt. 353. 361.

Eliot

Case 25.

Eliot *againſt* Skypp.

If the judge of aſſiſe *remember* that the verdict was contrary to the entry on the *poſtea*, it may be amended.

4. Co. 52. b. 2. Roll. Ab. 701. Cro. Eliz. 112. 150. Carth. 146. Cro. Jac. 185. Yelv. 186. 1. Wilſ. 33. Stra. 1197. Salk. 47. 53. 2. Burr. 383. 1. Bac. Ab. 107. Bull. N.P. 320. Dougl. 376. 730. 746. 2. Term Rep. 783.

DEBT for nineteen pounds ten ſhillings; and counts upon a leaſe for years of certain copyhold lands rendering eight-and-thirty pounds *per annum*, at *Michaelmas* and the *Annunciation*, by equal portions; and upon a leaſe of certain freehold lands in the ſaid vill rendering twenty ſhillings *per annum* at the ſaid Feaſts: and for nineteen pounds for half a year of the ſaid copyhold due at the *Annunciation* laſt, and for ten ſhillings for the freehold due at the ſame Feaſt, the action was brought.

The defendant pleaded *non debet*; and it was found for the plaintiff *quoad* the ten ſhillings for the freehold; and for the nineteen pounds *quoad* the copyhold rent it was found for the defendant.

The clerk of the aſſiſe returned the *poſtea*, that it was found for the plaintiff *quoad* ten ſhillings parcel of the ſaid nineteen pounds ten ſhillings; *et quoad* the nineteen pounds reſidue of the ſaid nineteen pounds ten ſhillings, that the defendant *non debet*.

And for this cauſe it was moved in arreſt of judgment, that the verdict is incertain which of theſe rents was not paid.

But becauſe that this iſſue was tried before JUSTICE BERKLEY, and he well remembered that the jury found for the copyhold rent for the defendant, and for the freehold rent for the plaintiff, therefore it was ordered, that the return of the *poſtea* ſhould be amended accordingly, and that then the plaintiff ſhould have his judgment.

Hilary

Hilary Term,

9. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.*
} *Juſtices.*

William Noy, *Eſq. Attorney General.*

Sir Richard Sheldon, *Knt. Solicitor General.*

Memorandum.

CASE 1.

IN the vacation betwixt *Michaelmas* and *Hilary Terms* SIR JAMES WESTON, one of the Barons of the exchequer (who was a wiſe and learned man, and of courage), died at his chamber in the *Inner Temple*; and afterwards, in *Eaſter Term*, 10. *Car.* 1. RICHARD WESTON, of the ſame *Temple*, was made ſerjeant, and within four days ſworn Baron of the exchequer.

The death of Baron *Weſton.* Jones, 341.

Dawes *againſt* Huddleſton (*a*).

CASE 2.

CALTHROP prayed a prohibition againſt the parſon of *W.* in the county of *Weſtmorland*, for ſuing for tithe of *trouts* taken in a river, becauſe they be *feræ naturæ*; and ſhewed a precedent in *Eaſter Term*, 5. *Car.* 1. where a prohibition was granted againſt the ſame parſon for ſuing for tithes of *eels* taken in the river, becauſe they are *feræ naturæ*; and day was given to ſhew cauſe why it ſhould not be granted.

Tithes are not payable for fiſh taken in rivers, except by cuſtom. Ante, 264. 1. Roll. Ab. 635, 636. 1. Sid. 278. 1. Lev. 179. Noy, 108. 1. Vent. 5. Palm. 527. Heil. 13. Bunb. 43. 256. 3. Com. Dig. 101, 102. and ſee the caſe of Rex *v.* Carlyon, 3. Term Rep. 385.

And RICHARDSON, *Chief Juſtice*, ſaid, that he knew where one ſuing for conies taken in *Methold Warren*, a prohibition was granted upon debate; and that in *Yarmouth* was a ſuit for tithes of herrings taken in the ſea, but they could not prevail.

JONES ſaid, that in his country of *Wales* they uſed to pay tithes for herrings; and in *Ireland* it is a common courſe to pay tithe of ſalmons taken in rivers.

RICHARDSON ſaid, that, peradventure, may be by cuſtom; otherwiſe tithes are not payable for fiſh taken in rivers.

(*a*) See 1. Roll. Ab. 635. b.

Gobbet's Caſe.

CASE 3.

PROHIBITION was prayed by BULSTRODE for *Gobbet*, to ſtay a ſuit in the ſpiritual court for defamation in ſpeaking theſe words, "He is a cuckoldly knave;" and cited precedents, that for ſaying, "he is a knave and a cheating knave," ſuit being in the ſpiritual court, a prohibition was granted upon good adviſement. —And the Court ſaid, that precedent is not like to this Caſe, for there was not any offence wherewith the ſpiritual court ought to meddle; but in this Caſe, for theſe words, it is properly to be examined and puniſhed there *pro reformatione morum*; for it is a diſgrace to the huſband as well as to the wife, becauſe he ſuffers and connives at it. Whereupon (*abſente* RICHARDSON) it was denied to grant a prohibition.

"He is a cuckoldly knave" are words puniſhable in the eccleſiaſtical court. Ante, 111. 229. 2 Roll. Ab. 296. 2. Salk. 692. 696. Stra. 471. 545. 823. 1100. Ld. Ray. 1136. 3. Lev. 137. Show. 337. Com. Dig. 508.

Carth. 498. 4. Burr. 4032. Stra. 535. 8. Mod. 115. Lut. 1038. 1. Sid. 148. 4.

SECONDLY,

A prohibition will not lie for citing a man out of the diocese of *London* to the diocese of *Canterbury*.

SECONDLY, it was moved, that this should be granted upon the statute of 23. *Hen.* 8. c. . becaufe he was fued in the court of the arches, which is in the archbiſhop's juriſdiction, and the words were ſpoken at *Thiſtleworth*, in *London* dioceſe, as appeared by the libel (*a*).

Ante, 97. 162.—Ray. 91. 2. Roll. Ab. 357. 446. Godb. 191. Cro. Jac. 321.

(*a*) See Lutw. 1039. and Stra. 471. 555.

A ſuit for matters accruing in *London* may be either in the *arches* or in the *conſiſtory* court; for the archbiſhops have remitted their courts to each other. Poſt. 456.

But JONES ſaid, that he was informed by DOCTOR DUCK, chancellor of *London*, that there hath been for long time a compoſition betwixt the biſhop of *London* and the archbiſhop of *Canterbury*, that if any ſuit be begun before the archbiſhop, it ſhall be always permitted by the biſhop of *London*; ſo as it is *quaſi* a general licence, and ſo not ſued there but with the biſhop's aſſent; and for that reaſon the archbiſhop never makes any viſitation in *London* dioceſe. And hereupon the prohibition was denied.

— 13. Co. 4. Raym. 3. 1. Sid. 65. 1. Lev. 221.

CASE 4.

Chapman's Caſe.

Barratry being an offence at common law, an indictment for it is good, though it conclude *againſt the ſtatutes*. Ante, 31.

ERROR by *Chapman*, to reverſe a judgment againſt him upon an indictment of being a common barrator; where having traverſed it in the county of *Devon* before the juſtices of aſſiſe there, and the indictment found and verdict againſt him, and judgment being given, that he ſhould pay one hundred marks for a fine, and be impriſoned for two months, and *ideo in miſericordiâ*;

THE FIRST ERROR aſſigned was, Becauſe the indictment is, that he was a common barrator *contra formam diverſorum ſtatutorum*, which is not good; for it is an offence at the common law, and there is not any ſtatute to puniſh it.—*Sed non allocatur*: for ſo is the common courſe of indictments; and common barratry is an offence againſt divers ſtatutes, *viz.* maintenance, and the like.

Juſtices of *oyer* and *terminer* for the trial of an iſſue joined before them may award a *venire* returnable the ſame day on which the party is arraigned. Ante, 315. 2. Roll. Ab. 82. Cro. Eliz. 148. 2. Sid. 99. 335. 2. Inſt. 568. 4. Inſt. 464. 9. Co. 118. 1. Bac. Ab. 281. 3. Hale, 191. precedent; and

THE SECOND ERROR, Becauſe upon the indictment, proceſs being awarded, he appeared *gratis* at the following aſſiſes and pleaded not guilty; and then a *venire facias* was awarded returnable the ſame aſſiſes, and was thereupon then tried and found guilty: that this *venire facias* was miſawarded to make it returnable at the ſame aſſiſes, where it ought to have been returnable at the next aſſiſes; ſo as there ought to have been fifteen days betwixt the *teſte* of the writ and the day of the return, and not to have been made returnable the ſame day.—*Sed non allocatur*: for it is the common courſe throughout all *England*. And as ROLLE, who moved it, ſaid, that true it is, when he is in the gaol, ſuch a trial may be the ſame aſſiſes, but not ſo when the party is at large and comes in *gratis*. But THE COURT ſaid, it is all one, and the trial good as well in the one caſe as in the other (*a*); and ſo it is here a good trial. Wherefore, &c.

1. Hawk. P. C. 526. (*a*) See 2. Roll. Ab. 96. where this is ſaid to be againſt all ſee 2. Hawk. P. C. 572, 573. 5. Bac. Ab. 259.

On an indictment for a finable offence, the entry of the judgment ſhall be *quòd capiatur*. 1. Roll. Ab. 225. Jones, 407. Dyer, 67. 245. 8. Co. 60. Cro. Jac. 255. 348. But now by 5. & 6. *Will. & Mary*, c. 12. in treſpaſs, ejectment, aſſault, or falſe impriſonment, no fine or *capiatur* ſhall be allowed entered, but the plaintiff in ſatisfaction of it ſhall pay 6s. 8d. on the judgment, which him in coſts. See 5. Mod. 285. 1. Salk. 54.

THIRDLY, It was alledged for error, Becauſe it is "*ideo in miſericordiâ*," where it ought to have been "*ideo capiatur*," being upon indictment for an offence finable. But it was thereto anſwered by BEARE, that the record is "*ideo committitur gaolæ*" (being there preſent), to remain for two months; ſo there needs not an

ideo

ideo capiatur but where he is abſent, for the *ideo in miſericordiâ* is but ſurpluſage.—Wherefore for this cauſe *Curia adviſare vult.*

Pridgeon's Caſe.

CASE 5.

PRIDGEON was brought to the bar upon a *habeas corpus*; and it appeared upon the return thereof that he, at *Lincoln*, upon complaint to two juſtices of the peace next adjoining, was ordered to keep a baſtard child, he being, according to the ſaid order, the reputed father. From this order he appealed to the next quarter ſeſſions of the peace; at which ſeſſions the matter being examined, he was diſcharged, and the former order repealed. Afterwards at another quarter ſeſſions of the peace, the matter being re-examined, it was ordered according to the firſt order, that he ſhould be accounted the reputed father of the baſtard, and ſhould keep it; and that if he did not perform it, he ſhould be apprehended and committed: and thereupon being apprehended and committed, and all this matter returned, THE COURT held, that he being diſcharged at the next ſeſſions, to which he appealed according to the ſtatute of 18. *Eliz.* c. 3. the ſecond ſeſſions hath no power to alter it: and becauſe none were there to maintain this return, he was bailed, and day given, that if other matter were not ſhewn, &c. he ſhould be diſcharged (*a*).

The ſeſſions may make an *original order* of baſtardy, as well as receive an appeal from the order of two juſtices; and in both caſes their adjudication is final.

Poſt. 350. 471. S. C. 2. Bulſt. 143. 356. S. C. Jones, 330. Ld. Raym. 1423. Stra. 475. 503. B. R. H. 79. 301. 1. Com. Dig. 584. 1. Bac. Ab. 319. Dougl. 632. and ſee Mr. Conſt's edition of Bott's Poor Laws, vol. i. page 442. to 447.

(*a*) This caſe was moved again, and the judgment confirmed. Poſt. 350.

See alſo 13. & 14. Car. 2. c. 12. ſ. 19. and 6. Geo. 2, c. 31.

Henry Cort *againſt* the Biſhop of St. David's and Others.

CASE 6.

Hilary Term, 8. *Car.* 1. *Roll* 454.

ERROR of a judgment at the grand ſeſſions in the county of *Pembroke*, in an aſſiſe of *darrein preſentment* (*a*) by *Henry Cort*, againſt *The Biſhop of St. David's*, *Dorothy Owen*, and *Thomas Pritchard*, for the church of *Stackpoole*.

Error in an aſſiſe of *darrein preſentment*.

Jones, 330.

THE FIRST ERROR aſſigned was, Becauſe upon the firſt day *Thomas Pritchard* appeared, and caſt an eſſoin, but the other two made default, whereupon *re-ſummons* iſſued againſt them, returnable *die Martis* next following; and at the next day they caſt an eſſoin, which was challenged and denied: and now moved to be an error, for that there was not *idem dies* given them, as there was to the firſt when he appeared and was eſſoined; and that there ought to have been one eſſoin allowed unto them.—*Sed non allocatur*: for *idem dies* ſhall not be given when they make default; and after once default and re-ſummons, an eſſoin is not allowable by the expreſs words of the 12. *Edw.* 2. c. .

By 12. *Edw.* 2. ſt. 2. an *eſſoin* not allowable after default and re-ſummons.

2. Inſt. 125. 1. Brownl. 160. Cro. Jac. 357. 5. Com. Dig. 313.

THE SECOND ERROR aſſigned was, Becauſe the count is, that he preſented *ad eandem*, and doth not name the church; ſo it is uncertain.—*Sed non allocatur*; for the church is firſt named in the plaint, and needs not to be named again.

The church being named in the *plaint* need not be named in the *count*.

THE THIRD ERROR aſſigned was, That *tales de circumſtantibus* was awarded, which ought not to be in an aſſiſe, but upon *niſi prius*; which was held a manifeſt error, if it had been ſo.—But upon view of the record, there were not *tales de circumſtantibus*, *ſed quòd habet decem tales ſecundum formam ſtatuti*; for it is intended by their petition, that they took their aſſiſe in the grand ſeſſions, which is appointed by the 34. *Hen.* 8. c. 26.

Tales de circumſtantibus cannot be awarded in an aſſiſe.

10. Co. 105. a.

(*a*) This writ is now become obſolete by the uſe of *quare impedit*.

CORT *against* BISHOP of ST. DAVID'S.

If the Court over-rules a party who offers a demurrer to evidence, this cannot be assigned for error, but is a proper case for a bill of exception.

S.C. Jones, 331. Hob. 15. Dougl. 119. 2. Term Rep. 125.

THE FOURTH ERROR assigned was, Because the issue being, whether *Henry Cort* did last present one *Richard Dolber* the last incumbent, who was instituted and inducted upon his presentation, the plaintiff offered in evidence letters of institution, which appeared to be, and so mentions that they were sealed with the seal of the bishop of *London*, because the bishop of *St. David's* had not his seal of office there; and those letters were made out of the diocese; and the defendant had demurred thereupon, that those letters were sufficient, and the demurrer was denied; which JONES said was an error, because they ought to have permitted the demurrer, and should have adjudged upon it.—But IT WAS HELD, that the not admitting of the demurrer ought not to be assigned for error; for when upon the evidence the matter was over-ruled by the justices of assise, that was a proper cause of a bill of exceptions, and the remedy which the statute appoints in such case: and for the matter of the letters of institution sealed with another seal, and made out of the diocese, it was held, they were good enough; for the seal is not material, it being an act made of the institution: and the writing and sealing is but a testimonial thereof, which may be under any seal, or in any place; but of that point they would advise.

In what manner a verdict in *darrein presentment* may find the issue.

Post. 348.

Watson, c. 15. Burn Eccl. 153.

THE FIFTH ERROR assigned was, Because the verdict finds the issue for the plaintiff, and that the church was full of the defendant, of the presentation of the other defendant, *per tempus semestre modo præteritum*, and doth not shew when, and how long time it was void, so as it might appear to the Court.—But WHITE answered, It is good enough; for it being found by the jury that the value of the church by the year was eighty pounds, and that it was void *per tempus semestre*, the Court shall intend it to be the full time of half a year; and the judgment being only for the 40l. is well enough: and so THE COURT agreed.

The grand sessions of Wales may send a prohibition, and write to the spiritual courts within the principality.

2. Sid. 92. Jones, 330. Vaugh. 418.

THE SIXTH ERROR assigned was, Because the writ of admitting the plaintiff's clerk is awarded to the archbishop of *Canterbury*, for that the bishop of *St. David's* was a party, whereas the justices of the grand sessions have no power to write to the archbishop; for they have no power to punish him if he doth not obey.—And of that point THE COURT doubted: but it seemeth *prima facie*, that they may well write to him; for it is now a court of the king's, and a *quare non admisit* lies, if he doth not admit: but when they were the marches in *Wales*, then they had no such power; and for that cause a *quare impedit* did lie in the adjoining counties, but not so at this day: but they would advise (*a*).

(*a*) It was moved again, and the judgment affirmed. Post, 348.

Brett

Brett *againſt* Read.

CASE 7.

ASSUMPSIT. Whereas he was indebted to the plaintiff in twenty pounds *for rent arrear*, in conſideration whereof he aſſumed to pay, &c.

An *aſſumpſit* will lie on an *expreſs promiſe* to pay a debt due by *ſpecialty* upon a new conſideration or forbearance, but not upon a promiſe *implied by law*. Poſt. 415. S. C. Jones, 326. 364. 1. Roll. Ab. 8. Moor, 340. Cro. Jac. 506, 598. 688. 1. Sid. 279. Hob. 284. Cro. Eliz. 67, 118. 242. 786. 859. 1. Brownl. 14. 3. Lev. 150. Hard. 366. 1. Leon. 43. 156. Strange, 648. 2. Bl. Rep. 1270. 1. Com. Dig. 184. Cowp. 128.

Upon *non aſſumpſit* pleaded, and verdict found for the plaintiff, it was moved in arreſt of judgment by GERMYN, that this declaration is not good: for it is a real contract, if it were upon a leaſe for years; and a general *aſſumpſit*, which is but an *aſſumpſit* in law, lies not for it, no more than upon a recognizance: alſo, it doth not appear that it was a rent upon a leaſe for years, but it might be rent-ſervice, rent-charge, or rent-ſeck that is behind; which is more ſtrong againſt the plaintiff.

GRIMSTON moved, *for the plaintiff*, that the action lies, becauſe it ſhall be intended rent upon a leaſe for years, which is by contract; and then an *aſſumpſit* may well be maintained upon it: and vouched the caſe of *Sir George Manſeull*, 17. *Jac.* 1. who brought an *aſſumpſit* againſt *J. S.* ſuppoſing that, in conſideration the defendant might have and enjoy quietly the herbage of ſuch a park for three years, he promiſed to pay one hundred pounds; and it was adjudged that the action well lay, becauſe it is but in nature of rent.

But ALL THE COURT held here, that the action lies not upon the general promiſe; but if he had alledged, that in conſideration he ſhould forbear the payment until ſuch a day, or upon ſuch a ſpecial conſideration, then the action would lie, but not upon a general *aſſumpſit*, for the reaſons before alledged; and the caſe cited may be good law, for it is a ſpecial promiſe to permit him to enjoy: and it was not a leaſe, nor for rent upon a leaſe. Wherefore it was here adjudged for the defendant.

Lord Haſtings *againſt* Sir Archibald Douglaſs.

CASE 8.

Trinity Term, 8. *Car.* 1. *Roll* 1331.

TROVER AND CONVERSION, as adminiſtrator of *Serjeant Davy*, for divers jewels. Upon not guilty pleaded, the jury found for part "not guilty;" for other jewels, that he is "guilty;" and for ſixty-five great pearls, and ſixty-five ſmall pearls, and a diamond chain, they found a ſpecial verdict, that

A huſband deviſes *the uſe* of all his plate and *jewels* to his wife during her widowhood, ſhe giving ſecurity to leave the ſame to his daughter on *her* death or ſecond marriage; this is not *a condition*, but *a limitation*; and though the wife uſually wore them *ut ornamenta corporis ſui*, yet ſhe cannot retain them as her *paraphernalia*, againſt this deviſe of *the uſe* of them only; for the expreſs *declaration* of the huſband will controul the *implication* which the law would otherwiſe have made.

SERJEANT DAVY was poſſeſſed of them, and being ſo poſſeſſed, made his will, and thereby deviſed *the uſe and occupation* of all his plate, hangings, and jewels to *Dame Elionor* his wife, during her widowhood, "ſhe giving good ſecurity to my daughter *Lucy*, "*Lady Haſtings*, to deliver and leave the ſame to my ſaid daughter "*Lucy* at the day of her death or ſecond marriage, which ſhould "firſt happen;" that he died poſſeſſed of thoſe jewels, and that after his death the adminiſtration of the goods of the ſaid *Sir John Davy* was committed to the plaintiff: that the ſaid *Elionor*, the wife of *Sir John Davy*, was the daughter of *Lord Audley*, earl of *Caſtlehaven*,

See 1. Com. Dig. 558.

LORD HASTINGS *against* SIR ARCHIBALD DOUGLAS.

and that ſhe in the life of *Sir John Davy* uſed the ſaid jewels, and "*ut ornamenta corporis ſui*" uſually wore them: that afterwards the ſaid *Elionor* married with the defendant, and that he converted thoſe jewels, &c.: and if the Court ſhall adjudge for the plaintiff, they find for the plaintiff, and damages 370l.; and if not, for the defendant.

S. C. Jones, 334. S. C. 1. Roll. Abr. 911. Moor, 213. 216. 2. Vern. 246. 1. P. Will. 729. 2. P. Will. 78. 542. 3. Eq. Caſ. 627. Pr. Ch. 27. 295. 2. Leon. 166. Noy's Max. 168. Thatch. 353. 1. Com. Dig. 558. 1. Bl. Com. 436. 8. Bac. Ab. 422. 2. Eſpin. Dig. 336. Co. Lit. 20. a. note (5). 1. Brown's C. C. 374.

Upon this ſpecial verdict, it was argued at the bar by GERMYN, *for the plaintiff*, and by CALTHROP, *for the defendant*: and now this Term it was openly argued at the bench.

BERKLEY and JONES, *Juſtices*, argued for the defendant, that ſhe being the daughter of a nobleman, and permitted to uſe them frequently, "*ut ornamenta corporis ſui*," and they being convenient for her degree, ſhe ſhould have them as her PARAPHERNALIA; and when there be not debts to be paid (as it doth not appear there were any) ſhe ſhall have them againſt the executors or adminiſtrators of her huſband, and that the huſband cannot diſpoſe of them from his wife by his will; but inſtantly by his death, the poſſeſſion of them being in the wife's cuſtody, the property is veſted in her, and the huſband cannot give them away: and that is of neceſſity and for conveniency in the law; for it is not reaſonable the huſband ſhould leave her naked of thoſe jewels which ſhe uſually did wear, and are fit (according to her calling) to wear. And it appears by *Linwood*, that the wife againſt her huſband's will hath ſuch an intereſt in goods which are her PARAPHERNALIA, that her huſband has nothing to do with them; but ſhe may make a will of them in her huſband's life-time, and may diſpoſe of them *in vitâ martiti invito marito*. But they ſaid, this is not allowable in our law, that ſhe ſhould diſpoſe of them in her huſband's life-time; but when the huſband doth not diſpoſe of them, they are inſtantly veſted in the wife: and although the huſband may make a gift of them in his life-time, yet he cannot make a will of them, to diſpoſe, &c.: and compared it to the caſe where a wife hath a term and takes huſband, he may give and diſpoſe thereof in his life-time, but he cannot diſpoſe of it by his will; as in the caſe of *Bramſby v. Grantham*, and the caſe of *Bracebridge*, *Plowd.* 416. and in the caſe 1. *Hen.* 5. "*Executor*," 108. The king may give the jewels of his crown by letters patents, but he cannot by his teſtament diſpoſe of them (*a*).

Co. Lit. 300. 351. a. Pl. Com. 525. Moor, 214. 2. Vern. 245. Chan. Caſes, 129. 1. Peere Will. 502. 651. Powel on Cont. 256.

BERKLEY, *Juſtice*, ſaid, That this permiſſion of the wife to wear them uſually, is as a gift of them to her by her huſband: and compared it to the caſe of 11. *Hen.* 4. *pl.* 83. where one takes my ſon and clothes him, or my wife and clothes her, it is as it were a gift of the ſaid apparel to them: and as by the cuſtom of *London*, and in ſome places in *Wales* (as JONES ſaid), the wife ſhall have the moiety of the goods whereof her huſband dies poſſeſſed, yet her huſband in his life-time may give all the goods, but by his will he cannot prejudice her concerning her part; wherefore he concluded, that ſhe ſhould have them notwithſtanding the will.

(*a*) Wood's Inſt. 110. Cro. Eliz. 464. 684.

JONES,

JONES, *Juſtice*, ſaid, that by the civil law, as the condition to tie her from marriage, ſo the limitation to have theſe jewels during her widowhood is void, becauſe ſhe is abſolutely poſſeſſed of them. Whereupon they concluded, that judgment ought to be given for the defendants. LORD HASTINGS *againſt* SIR ARCHIBALD DOUGLAS.

But RICHARDSON, *Chief Juſtice*, and MYSELF, argued to the contrary, and that this is a good will, and that ſhe may not take them but according to the will: but if the huſband had not made a will, but had left them to the diſpoſition of the law, and the queſtion had been betwixt the executor or adminiſtrator and the wife, where there be not any debts or legacies to be paid, or where there be *aſſets* to pay all debts and legacies beſides thoſe jewels, there peradventure the law will allow her to take and enjoy them as her PARAPHERNALIA; but where the huſband hath made a will and limited how ſhe ſhall have them, ſhe ought to take them as the huſband appointed, and his will is as good and as well to be performed as his gift in his life-time: and that it is not like the caſe of 11. *Hen.* 4. *pl.* 83. for there it is a good gift to the ſon and to the wife by the raviſher, and the huſband may well aſſent to them: ſo are the caſes of 11. *H.* 4. *pl.* 12. and 34. *Hen.* 6. *pl.* 10. that goods dedicated to the ſervice of a chapel or church are a good gift to the wardens of them in law: but this permiſſion by the huſband for the wife to wear them cannot be a gift of them in deed nor in law; for the huſband cannot give aught to the wife, they being both but one perſon in law. And as to the objection, that although an huſband may diſpoſe of them by act in his life, yet he cannot by his will; it was anſwered, True it is, that a man who hath a thing real in another's right, as a term, although he may give, yet he cannot deviſe it; as in *Bracebridge's Caſe* (*a*): ſo where an executor makes a gift of goods which he hath as executor, it is a good gift; but a deviſe of them is not good, becauſe he hath them *in auter droit*: but of all chattels perſonal, although the wife had them before marriage, the abſolute property by the marriage is veſted in the huſband, and he may give them in his life, or diſpoſe of them by his will; ſo of thoſe goods which are termed PARAPHERNALIA, the abſolute property is in the huſband, and therefore he may well deviſe them. And to the caſes, that the huſband may by gift of all his goods *bonâ fide* prevent his wife that ſhe ſhall not have any part of them, notwithſtanding the cuſtom in *London*, *Wales*, and elſewhere, yet by his will, if he deviſeth them, it ſhall not fruſtrate what ſhe ought to have by the cuſtom, they agreed to be good law; for cuſtom is another law, and inſtantly by the death of the huſband fixeth the intereſt in the wife: but the goods which ſhe claims as PARAPHERNALIA be not given to the wife, but thoſe which are of neceſſity and conveniency for her; and when the huſband leaves her what is for her neceſſity, *viz.* neceſſary apparel, he may well make a diſpoſition of the reſidue by his will: and for that purpoſe was cited 19. *Hen.* 6. *pl.* 14. A wife for her *quarentine* may have her living *de communi*, but ſhe may not take any thing unleſs for neceſſity: and where the civil law ſaith, that ſhe may

Moor, 416.

Co. Lit. 351.

Co. Lit. 300. & 351. a.

(*a*) Plowd. 192.

Lord Hastings *against* Sir Archibald Douglas.

make a will in the life of her husband of her PARAPHERNALIA, yet the common law, whereby we are to be guided, is expressly contrary to it, that she may not make a will of any goods but with her husband's assent, and then it is as his own gift; but of an obligation, or things in action, a wife may make executors by assent of her husband, and may make her husband her executor, as appears by the books 4. *Hen.* 6. *pl.* 31. 39. *Hen.* 6. *pl.* 27. 3. *Edw.* 3. "*Devise*," 12. 26. *Edw.* 3. *pl.* 71.; and the interest, and possession, and property of such goods as are called PARAPHERNALIA are in the husband, and he may devise them to his wife: and that she shall take them by the devise appears 33. *Hen.* 6. *pl.* 31. where he devised to his wife her apparel, and she justifies the taking of them by the devise and delivery of the executor; 37. *Hen.* 6. *pl.* 28. that she ought to take only her necessary apparel; 1. *Eliz. Dyer*, 166. 18. *Edw.* 4. *pl.* 11. 12. *Hen.* 7. *pl.* 23, & *pl.* 24. that the property and possession of those goods be in the husband, and she may not make a will of them without her husband's assent. And a case was cited in the exchequer in *Trinity Term*, 28. *Eliz.* betwixt the Lord Treasurer and others executors of viscount *Bindon*, against *Mary* viscountess *Bindon* (*a*), in an action of trover and conversion of jewels of the value of 1000l. she pleads to all besides such jewels (which were a chain and bracelets not exceeding the value of 160l.), not guilty: and as to them she pleads, that she was the wife of viscount *Bindon* at the time of his death, and she usually wore those jewels as ornaments of her body; and avers, that the executors had *assets* to satisfy his funeral, and all his debts and legacies, besides those jewels: and issue was taken, that they had not *assets* to satisfy all the debts and legacies besides those goods (*b*); so thereby it is to be observed, that jewels of 160l. for a viscountess were not allowable for PARAPHERNALIA. And it was answered, although here in this case the defendant be the daughter of an ancient baron of this realm, and of an earl in *Ireland*, yet being married to *Serjeant Davy*, she ought to have them as his wife: and there is not any necessity she should have a chain of diamonds, and the said sixty-five great pearls, and the sixty-five small pearls, which are things hanging loose, and are not in any chain or bracelets; and they be not for any necessity, for ornament, or for covering. But *quâcunque viâ datâ*, the husband having expressly disposed of them by his will, she may not against his will take them without the assent of the administrator, and without delivery, and not of her own head detain them without entering security. And where it is alledged, that in the civil law a condition to restrain a second marriage is not allowed; this is no condition, but a limitation only, and it is reasonable she should take accordingly. And it was alledged, that this is not any *devise* of those jewels, but only *the use and occupation* (*c*) of the plate, hangings, and jewels during her widowhood, and no absolute gift of them; as is in the case of *the Grayle* (*d*), and in *Welden's Case* (*e*): and they concluded, that it is a good disposition by the will, and a declara-

1. Peere Will. 4. Co. Lit. 20. a. 1. Brown's Cas. in Ch. 274.

8. Co. 95.

(*a*) 2. Leon. 166.

(*b*) That this case is not truly reported here, and that there is no judgment entered on the roll, *vide* MSS. plac. fo 161. *ad finem.* —*L. C. B.* Parker's *MSS.*

(*c*) It is now settled, that limitations over in a will of the *thing itself* are good. 8. Co. 95. 10. Co. 46. 2. Freem. 137. 2. Peere Will. 1.

(*d*) Year-Book, 37. Hen. 6. pl. 30.

(*e*) Plowd.

tion

tion of his intent, and takes away that which otherwiſe ſhe might claim by the law; and his expreſs declaration controuls any implied gift, as is pretended: and foraſmuch as ſhe hath not performed it, the limitation is determined, and neither ſhe nor her huſband can have them. Wherefore they concluded for the plaintiff.

LORD HASTINGS *againſt* SIR ARCHIBALD DOUGLAS.

The King *againſt* Bagſhaw.

CASE 9.

INFORMATION by *Fletcher* for the king and himſelf againſt *Bagſhaw*, and demands twenty-two pounds upon the 5. *Eliz.* c. . for occupying the trade of a goldſmith, not being an apprentice to that trade. The defendant pleaded the cuſtom of *London*, "that one being an apprentice for ſeven years, and made freeman "of *London* of any trade, may uſe any other trade in the ſame "city:" and ſhews, that he was bound an apprentice in the art of the cordwainers, and ſerved therein for ſeven years, and was made freeman of *London*; whereby he juſtifies, &c. The king's attorney demurs thereupon; and it was argued divers times at the bar.

By the cuſtom of *London* an apprentice to one trade may uſe any other, notwithſtanding 5. *Eliz.* c. 4. Poſt. 516. 8. Co. 126. 1. Bl. Com. 75. 3. Bac. Ab. 533.

FIRST, Exception to the manner of the plea, becauſe he pleads *quod uti poſſit* any other trade, and not *quod uſus fuit*: and for that was relied upon 22. *Edw.* 4. 8. "*Preſcription*," *quod poſſit tourner ſon plough*, and doth not ſay that he hath uſed to turn, &c. is not good. But it was thereto anſwered by GRIMSTON, that this being alledged by way of cuſtom in the city, and not as a particular preſcription, is well enough; for peradventure it is a thing intended, and ſo not uſed in fact: and in proof thereof was cited 21. *Edw.* 4. 28. *Old Book of Entries*, 141. pleading, that every citizen and freeman may deviſe in mortmain, allowed to be good.—THE COURT inclined to that opinion.

In pleading a cuſtom of *London*, it is ſufficient to ſay that every citizen *may uſe* the cuſtomary privilege. 3. Leon. 83. Ray. 4. 1. Lev. 12. 177.

SECONDLY, The matter of the plea is not good, becauſe cuſtom cannot be alledged againſt a ſtatute. But it was thereto anſwered, that being the cuſtom of *London* (which cuſtoms are confirmed by parliament), it ſhall be good.—But thereof THE COURT doubted, and delivered not any opinion, becauſe the king's attorney this Term waived the demurrer, and took iſſue upon the cuſtom, and prayed that the defendant might rejoin; whereupon the defendant moved now by ROLLE, that he might waive his plea, and plead not guilty. But THE COURT doubted whether he ſhould be received, without the aſſent of the attorney general; wherefore they would adviſe: and afterwards the attorney being moved, would not aſſent; whereupon he rejoined, &c.

The king may withdraw a *demurrer*; but this will not entitle the defendant to withdraw his *ſpecial plea* and plead the *general iſſue*, except the attorney general conſents. Poſt. 361. 513. Ante, 291. Style, 479. Cro. Jac. 85. 1. Burr. 316.

Vaugh. 65. Hard. 555. Plowd. 322. a. 1. Saund. 341. Ray. 4. Barnes, 155. Strange, 266. 4. Com Dig. 463.

Case 10.

Cort *againſt* The Biſhop of St. David's.

Ante, Page 341.

A verdict in *darrein preſentment* finding the iſſue for the plaintiff, and that one of the defendants was incumbent on the preſentation of the other defendant *per tempus ſemeſtre modò præteritum* is good, without finding when the church became void. Cowp. 828.

THIS Caſe was moved again by NOY, *Attorney General*; and he principally inſiſted, that the verdict was not good, and the jury had not well enquired, becauſe they did not find when the church became void, but ſaid in their enquiry *quod tempus ſemeſtre modò tranſivit*, which may be long time before the writ brought. —But ALL THE COURT *ſeriatim* delivered their opinions, that the verdict is good; and it is not neceſſary to find when the church became void; but *modò tranſivit* ſhall be intended, that the ſix months paſſed hanging the writ, which is only enquirable in reſpect of the damages: and when here the value of the church is enquired and found of the annual value of eighty pounds, and that the defendant *Pritchard* is found to come in *ex præſentatione* of the defendant *Owen*, ſo the patron and incumbent are named in the writ, although the defendant may be in for ſix months by the ſame patron which was named before the writ brought, he ought to be removed: and the judgment is for forty pounds, which is the moiety of the value; therefore the enquiry and the judgment are good enough. And for all the other errors aſſigned, THE COURT allowed none of them: and although the precedents be, that in the declaration he declares, *et unde dicit quòd ipſe* (*idem* the plaintiff) *ad eandem eccleſiam præſentavit*, and here omits the words "*ad eandem* "*eccleſiam*;" yet becauſe it cannot have any other intendment, but that he preſented to the ſame church mentioned in the plaint; and the words after, that "he was admitted, inſtituted, and inducted "*in eâdem*," which refers to the church mentioned in the plaint; therefore it was held good enough. Whereupon judgment was affirmed.

Case 11.

Farewether's Caſe.

An *indictment* on an iſſue joined in the king's bench may be tried in the county where the offence was committed, by writ of *niſi prius*; and the attorney general may, by the king's letters, have the writ without leave of the Court.

Savil, 2. 4. Co. 43. 2. Inſt. 424. Raym. 367. 4. Bl. Com. 344. 6. Mod. 246. 123. 2. Hawk. P. C. 378. 4. Com. Dig. 463.

A CERTIORARI was awarded to the juſtices of aſſiſe of the county of *Suffolk* to remove an indictment of common barratry againſt one *Farewether*, a juſtice of peace of the ſaid county: and the indictment being removed, and the defendant traverſing it, and rule given for trial thereof at the bar, and that the defendant ſhould bear the charges of the witneſſes, becauſe the record was removed at the defendant's ſuit,

NOY, *the King's Attorney*, moved, that it ſhould be tried in the county by *niſi prius*, becauſe otherwiſe divers witneſſes would not appear to proſecute by reaſon of the charge and trouble; and that the king hath his election in what court and in what manner he will try his ſuits.

But THE COURT conceived, becauſe it concerned a juſtice of the peace, who peradventure might have incurred the diſpleaſure of many, by reaſon of his diligent executing his office; and for that it is a cauſe which will require great examination, and is not fit, by reaſon of the ſhortneſs of time, to be tried at the aſſizes by *niſi*

prius;

prius; therefore they denied his motion, and held it convenient it ſhould be tried *in banco*: and divers precedents were cited of one *Awſten* and of one *Whyſtler* and others, where, in ſuch caſe, trials were *in banco*. But the king's attorney ſaid, thoſe were by conſent; which was denied. And KEELING, *Clerk of the Crown*, ſaid, that divers precedents have been of ſuch trials upon indictments *in banco* without any conſent of the parties, and againſt the will of the proſecutors, and in more remote counties. And THE COURT ſaid, by the ſtatute of *niſi prius* it is appointed, "that trials ſhall "be *in banco*, where the cauſes *magnâ indigent examinatione*," as this caſe doth: but if the king will ſignify his pleaſure that they ſhall be tried by *niſi prius*, it is fit he ſhould be obeyed; yet not upon ſuggeſtion of the parties only. Afterward the king by his letters ſignified his pleaſure, that it ſhould be tried by *niſi prius*.

FARLEWETHER'S CASE.

See the Year-Books 22. *Edw.* 2. *pl.* 3. and 27. *Edw.* 3. *pl.* 4. 2. Inſt. 424. 4. Inſt. 159.

Viſcount Dunbarr's Caſe.

CASE 17.

THE JUSTICES AND BARONS were aſſembled at *Serjeants-Inn*, in *Chancery-lane*, by the king's command, upon a queſtion concerning the king, in a caſe proſecuted by *Dr. Chambers* againſt *Viſcount Dunbarr*; where a fee farm, due to the king out of the lands of the *Viſcount of Dun*, being arrear for divers years, was omitted out of the charge by the connivance or negligence of the clerk, who ought to have put it in charge, and ſo continued until the pardon of 21. *Jac.* 1. Whether it were diſcharged by the pardon?—And IT WAS RESOLVED, that it was not; for it is a debt to the king, and the omiſſion of a clerk ſhall not prejudice him; as alſo, becauſe it is excepted by the pardon, if not by the words, at leaſtwiſe in the intent.

Debt for rent to the King ſhall be excepted out of a pardon, though not put in charge in the exchequer.

5. Co. 47. 3. Mod. 242. 3. Lev. 135. Hard. 363.

Peck *againſt* Ambler.

CASE 13.

Michaelmas Term, 9. *Car.* 1. *Roll* 348.

ASSUMPSIT. Whereas the defendant, 1. *Car.* 1. promiſed the plaintiff, that he ſhould enjoy ſuch lands in poſſeſſion, and that he would ſave him harmleſs concerning any action and ſuit againſt him for them; that he was ouſted of the poſſeſſion by *Meddlecourt*, 1ſt *July*, 3. *Car.* 1. and that a good recovery was had againſt him in an *ejectione firmæ*, 2. *Car.* 1. wherein he was condemned in damages and coſts ſeven pounds, by reaſon whereof he feared to be arreſted: that upon the 1ſt *Auguſt*, 7. *Car.* 1. he gave unto him notice thereof, and required him to diſcharge him of that judgment, and ſave him harmleſs from it; and that the defendant had not diſcharged the judgment, whereby he remained ſubject thereto, and durſt not go about his buſineſs, to his damages, &c. The defendant pleaded the ſtatute of limitations, that this ouſter was upon a judgment in *Trinity Term*, 2. *Car.* 1. and the notice and requeſt in *July*, 2. *Car.* 1. ſo more than ſix years after the cauſe of action, and before the action brought; and traverſeth the ouſter in *July*, 3. *Car.* 1. or any time after *July*, 2. *Car.* 1. And hereupon the plaintiff demurred.

To an action on a promiſe of quietenjoyment, and to ſave the poſſeſſor harmleſs, the defendant may plead the ſtatute of limitations.

Cowp. 218.

WHYTFEILD,

PECK *against* AMBLER.

WHYTFEILD, *for the defendant*, now moved, that the plea made good the matter alledged, becauſe the breach was before the ſix years.

THE COURT inclined to that opinion: but becauſe he failed in the other part of the breach of the *aſſumpſit*, *viz.* in not ſaving harmleſs, but ſuffering the judgment to remain in force, and by reaſon thereof he was endangered to be arreſted, which part is not anſwered, therefore the plea was held ill: for by the judgment he is damnified, although it be not alledged that execution is ſued, he being ſubject to the execution and in danger to be charged: and although the defendant be a ſtranger to this ſuit wherein damages and coſts are given, and therefore ought to have notice, yet when notice is given unto him thereof, he ought to procure him to be diſcharged; and therefore the plea is ill on that part; and the demurrer being general, judgment is to be given for the entire *aſſumpſit* againſt him. And it was therefore adjudged for the plaintiff.

5. Co. 24.

On an *entire contract*, to be performed at ſtated times, an action lies for the whole contract, on the firſt breach of performance.

AND JONES and BERKLEY held, that if a man aſſume to pay fifty quarters of malt in five years, every year ten quarters, if he fail of the payment of any of them, an *aſſumpſit* lies, and he ſhall recover damages for all which is arrear, and for all the reſidue of the five years; but I doubted thereof: but for the principal we all agreed.

Ante, 241. Dyer, 113. a.

CASE 14.

Hart's Caſe.

A *procedendo* refuſed to a ſuit removed from the ſheriff's court in London for calling a woman a whore. Poſt. 394. 487. 4. Co. 18. 4. Burr. 2032. Stra. 187. 545. 471. Fort. 347. B. R. H. 392. 2. Mod. 114. Andrews, 7.

MARGARET HART brought an action in the ſheriff's court in *London* againſt another woman, for ſaying, that ſhe was "an arrant whore, and went from chamber to chamber playing "the whore." This was removed by *habeas corpus* into this court, and bail put in.

STONE moved, *for the plaintiff*, to have the cauſe remanded, becauſe for theſe words action lies not here, but they were actionable there by the cuſtom of *London*, becauſe ſhe is there puniſhable for ſuch offence.

But THE COURT denied to grant a *procedendo*, and ſaid, an action lies not for theſe words, but that ſhe ſhould be ſued for defamation in the ſpiritual court only.

1. Com. Dig. 180. Douglas, 380.

CASE 15.

The Caſe of Pridgeon.

Vide ante, Page 341.

If the ſeſſion, upon appeal, reverſe an order of baſtardy made by two juſtices, the act of the ſeſſion is final, and no other ſeſſion or authority can meddle. Ante, 341. Poſt. 471.

THIS Caſe was now moved again by GRIMSTON.—And ALL THE COURT, RICHARDSON, *Chief Juſtice*, being preſent, delivered their opinions *ſeriatim*, that the order in the firſt ſeſſions was concluding, and the order in the laſt ſeſſions was merely void; for the 18. *Eliz.* c. 3. appointing, that upon appeal to the ſeſſions from an order of two juſtices of the peace, their order ſhall bind him who is adjudged to be the reputed father, and he in this caſe having appealed to the ſeſſions, and they making an order in court, that order is final, and no other ſeſſions nor authority may meddle therewith.

Jones, 147. 330. 475. 503. 2. P. 443. 2. Bnlſt. 343. 355. 1. Salk. 122. 482. Ld. Ray. 1423. B. R. H. 301. Strange, 105. 2. Seſſ. Caſ. 234. 1. Com. Dig. 584. and ſee Mr. Conſt's edition of Bott's Poor Laws, vol. i.

JONES,

JONES, *Juſtice*, to prove this, ſaid, it was reſolved by all the Juſtices of *England* upon conference, in the caſe of one *Andrew Windſor* (*a*), upon the 43. *Eliz.* c. . of charitable uſes, if an appeal be upon an order of the commiſſioners of charitable uſes to the lord keeper, and he by decree confirm the order, that confirmation is perpetually binding; and there cannot be a bill of review thereof: ſo it hath been reſolved, where, upon the 37. *Hen.* 8. c. . for tithes in *London*, if a judgment be given by the lord mayor, and upon an appeal to the lord keeper that judgment be affirmed, &c. the party is concluded, and ſhall not have aid by bill of review. PRIDGEON'S CASE.

ALL THE COURT thereupon reſolved, that the ſecond order made at the ſecond ſeſſions was merely void, and his commitment unlawful; wherefore he was abſolutely diſcharged.

AND IT WAS HELD, that the 3. *Car.* I. c. 4. doth not aid this caſe; for the ſtatute there is, that "if the two next juſtices of "peace make not proviſion for the baſtard, the juſtices of peace at "their quarter ſeſſions ſhall ſettle an order for keeping of the baſ-"tard, as the two next juſtices ought;" but it doth not give more power or authority, nor gives authority to one ſeſſions to alter that which in a former ſeſſions was ordered. The ſtatute 3. *Car.* I. c. 4. doth not give authority to one ſeſſion to alter that which a former ſeſſion has ordered.

Peſt. 471. I.—Salk. 122. 1. Stra. 475. 1. Bott's Poor Laws, 444. Dougl. 632.

(*a*) Ante, 40.

See 6. Geo. 2. c. 31.

Wickham and Others *againſt* Enfeild and Elizabeth his Wife. CASE 16.

Michaelmas Term, 8. *Car.* I. *Roll* 66.

ERROR of a judgment in DOWER, by *Wickham* and others, againſt *Enfeild* and *Elizabeth* his wife, late the wife of *William Symms*, which ſhe demanded as her dower of the lands of *William Symms*, her former huſband. To dower, the defendant may plead *nunques accouple in matrimonie*; and if iſſue be taken thereon, the fact ſhall be tried by certificate.

The defendant pleaded "*n'unques accouple in loyal matrimony.*"

Iſſue, "*quod fuit accouple in loyal matrimony.*"

A writ was thereupon awarded to the biſhop, who certified, that ſhe was accoupled "*in vero matrimonio cum prædicto* WILLIELMO, "*ſed clandeſtino, et quòd* WILLIELMUS *et* ELIZ. *thori et menſæ parti-*"*cipatione mutuo cohabitaverunt uſque ad mortem prædicti* WILLI-"ELMI." And upon this certificate judgment was given for the demandant.

The error aſſigned was, That there was not a writ original nor warrant of attorney for the defendant. But, upon diminution alledged, *the writ* was certified: But for *the warrant* of attorney, becauſe it was not aſſigned of record that diminution might be alledged, it was held it was not now aſſignable. The want of a warrant of attorney, if aſſigned for error, muſt be aſſigned on record. Cro. Jac. 6. 142.

THE SECOND ERROR aſſigned, Becauſe the *writ of view* (*b*), upon view demanded, was awarded and returned, and nothing indorſed thereupon, that the ſheriff delivered the view.—But becauſe he afterwards appeared and pleaded, he ſhall not now have advantage thereof. Alſo, THE COURT ſaid, it was good enough without the ſheriff's name indorſed upon it. A writ of view is good without an indorſement on the return. Ante, 190.

(*b*) See the 4. Ann. c. 16. ſ. 8.

THIRDLY,

A bishop's certificate of the fact of marriage is good, without naming *day* or *place* of marriage.
2. Roll. Ab. 591.

THIRDLY, It was alledged for error, That there was neither day nor place of the marriage mentioned in the bishop's certificate:—*Sed non allocatur:* for the day or place of the marriage is not material; for it is not issuable, because the certificate from the bishop is concluding.

Co. Lit. 33. a. Dyer, 313. 9. Co. 19. 2. Salk. 437. Comb. 473.

In dower, on an issue of "*accouple* "*in loyal matri-* "*monie,*" a certificate "*qu'el* "*fuit accouple in* "VERO *matri-* "*monié sed clan-* "*destine*" is good.
2. Roll. Ab. 591. 2. Bac. Ab. 284. Salk. 437. Andr. 227.

THE FOURTH ERROR was assigned *ore tenus* by PULESTON, of counsel with the plaintiff in the writ of error, that this certificate is not good; for it doth not answer to the words in the issue, which are, "*quod ne unques accouple in loyal marriage*;" and he ought accordingly to have answered, "*quòd fuit copulatus in legi-* "*timo matrimonio.*" And he doth not answer to the words in the issue, but, "*quòd verò matrimoniò, sed clandestinò copulati fuerunt, &c.*" for that it was a true matrimony, and that they lived together at bed and board, is but argumentative, that they were lawfully married.—*Sed non allocatur:* for *vero matrimonio*, although *clandestino copulati fuerunt*, is as good as *legitimo matrimonio*, for they be all one in intendment, although they be not the same words; and although it be *clandestino*, it doth not vitiate the marriage: and when it is added, that *thori et mensæ participatione durante vitâ* the said WILLIAM and ELIZABETH *cohabitaverunt*, that proves they continued as husband and wife during his life, and it is not now to be questioned. WHEREFORE the judgment was affirmed.

CASE 17.

Sharp's Case.

An indictment for perjury on 5. *Eliz.* c. 9. must shew with convenient certainty that the oath was concerning land; that it was material to the issue, and prejudicial to the party.
Ante, 322.
3. Inst. 167. 1. Hawk. P. C. 333. Ld. Ray. 867. 1. Peere Will. 869. Dougl. 156. 1. Term Rep. 69.

SHARP was indicted of perjury upon the 5. *Eliz.* c. 9. for that whereas one *Henry Dumport* was seised in fee of a manor in *Sheapside*, in the county of *Leicester*, whereof one great waste, containing two hundred acres, lying betwixt such a river on one side, and such a brook on the other side, was parcel; and whereas there was a suit in chancery betwixt the said *Henry Dumport* and the *Earl of Rutland*, and a commission issued under the great seal for the examination of divers witnesses; and interrogatory was exhibited, Whether he knew the parties; whether he knew the said parcel of waste in question; and if it were the soil and freehold of the *Earl of Rutland*, and parcel of his manor of *Sheapside*, or not? he being examined upon these interrogatories before the said commissioners, falsely, voluntarily, and corruptly, deposed upon his oath, that it was the soil and freehold of the said *Earl of Rutland*, and parcel of his manor of *Sheapside*; UBI REVERA it was not the soil nor freehold of the said *Earl of Rutland*, nor parcel of his manor of *Sheapside*, but parcel of the manor of the said *Henry Dumport*, in *Sheapside*; and so committed wilful and corrupt perjury against the statute.

BABINGTON moved to quash the indictment, Because he doth not shew what was the issue in chancery, nor that this land was there in question; nor it doth not appear that it tended to the proof or disproof of the issue, so as it might be a damage to the plaintiff.

RICHARDSON, *Chief Justice*, and MYSELF were of this opinion: and although the interrogatory mentions it to be the land in question,

queſtion, it is not ſhewn how it is in queſtion; and there can be no indictment upon this ſtatute but where it is ſhewn, that the depoſition is upon the matter in queſtion, and conducing to the iſſue, and the party thereby prejudiced. SHARP's CASE.

RICHARDSON, *Chief Juſtice*, ſaid, it is uſual in the ſtar-chamber to diſmiſs bills, if it be not ſhewn what was the iſſue, and how the perjury conduced thereunto, and how in prejudice of the party.

JONES, *Juſtice*, doubted whether the indictment were good in reſpect of this exception; but becauſe it was an odious crime, he wiſhed the defendant to plead not guilty, and to try it; and upon the evidence it would appear whether it were pertinent, and what was the iſſue which ought to be proved.

But BERKLEY, *Juſtice*, held it to be good enough; for it would be too prolix to ſhew the bill and anſwer, and what was the iſſue (*a*): and inaſmuch as it is alledged there was a ſuit betwixt them in chancery, and the interrogatory is, "Whether he knew "the land in queſtion?" which ſhews that the land was in queſtion, and a convenient certainty is mentioned, it ſufficeth; otherwiſe he agreed it was not good.

WHEREFORE it was adviſed, there being two indictments, he ſhould plead to the one, and ſo try the truth, and the exception ſhould be ſaved.

(*a*) See 23. Geo. 2. c. 11. as to the form of the indictment, and 2. Geo. 2, c. 8. as to the puniſhment of perjury.

Mackaller *againſt* Todderick. CASE 18.

Cujus Principium ante, Page 337.

THIS Caſe was now moved by GYBBS, *for the defendant* in the writ of error, that the conſideration is good; for it is for his ſolicitation and labour in procuring him to be preſented, which in itſelf is no ſimony, nor cauſe to avoid the contract: and admitting it were ſimony, yet not being an offence at the common law, nor triable by courſe of the common law (but an offence only made by the canons), it was not puniſhable at the common law until the ſtatute of 31. *Eliz.* c. 6.: and therefore in *Michaelmas Term*, 40. & 41. *Eliz.* in the common pleas (*a*), it was adjudged, that where an obligation was for the payment of money, and the defendant pleaded it to be made for the performance of a ſimoniacal contract, and ſhews how; upon demurrer it was adjudged, that it was merely a ſpiritual offence, whereof the common law did not take any cognizance, and therefore was no plea to avoid the bond. And in the caſe of *Taverner v. Smith* (*b*), in an information on the ſtatute of 31. *Eliz.* c. 6. it was reſolved, that he ought to ſuppoſe a corrupt contract, and not a ſimoniacal contract; for the ſtatute doth not make the obligation and contract for ſimony to be void, like the 13. *Eliz.* c. 8. ſ. 5. of uſury (*c*), and the 23. *Hen.* 6. c. 10. for ſheriffs.

A promiſe to pay a ſum of money in conſideration that the plaintiff would procure the defendant to be preſented and inſtituted to a *donative*, is void. Ante, 337. 1. Roll. Ab. 18. Powel on Cont. 177. 197. Cowp. 39. 4. Bac. Ab. 465. 4. Term Rep. 78.

FLETCHER to the contrary. For ſimony hath always by the law of God and of the land been accounted a great offence: and an *aſſumpſit* or bond with a condition to pay a ſum of money for a ſimoniacal contract, is accounted againſt law, and void; as if one

(*a*) Oldbury v. Gregory, Moor, 564. (*b*) Cro. Eliz. 686. (*c*) See 12. Ann. c. 12.

ſhould

MACKALLER *againſt* TODDERICK.

ſhould promiſe another ten pounds to beat ſuch a man, it is void, 2. *Hen.* 4. 9. An obligation with a condition to ſave harmleſs concerning embezzling of a writ and not returning thereof is void, becauſe againſt law.

RICHARDSON, *Chief Juſtice*, ſaid, he much doubted thereof; becauſe the promiſe is, to pay ſo much for his labour and travail, and not for the preſentation. *Et adjournatur.—Reſiduum poſtea, page* 361.

CASE 19.

The King *againſt* George Archbiſhop of Canterbury and Tho. Pryſt.

Trinity Term, 4. *Car.* 1. *Roll* 441.

Quare impedit to preſent to a church above the value of 8l. a-year, the incumbent having taken another benefice. Plea confeſſing the acceptance of the ſecond benefice, and that the church was thereby void, but that the offence was within a general pardon, Replication ſhewing an exception in the pardon. *Ante*, 61.

Hetley, 124. Jones, 334. 2. Wilſ. 174. 3. Burr. 1504. 1509.

QUARE IMPEDIT *ad præſentandum ad eccleſiam vicariæ de* ICHINGSTOCK, and makes title by the ſtatute of 21. *Hen.* 8. c. 13. for that one *Shilſton*, being vicar of *Ichingſtock* (which was a benefice with cure of ſouls above the value of eight pounds a-year), in the fifteenth year of king *James* took a ſecond benefice, *viz.* the vicarage of *Holcomb-Burnel*, in the county of *Devon*, being a benefice with cure; and was thereto admitted, inſtituted, and inducted, whereby the firſt benefice became void, and remained void for two years, and ſo title of preſentation accrued to king *James*, and from him deſcended to the king which now is, and therefore belongs to the king to preſent.

The archbiſhop claims nothing but as ordinary.

The defendant *Pryſt* pleads, and confeſſes the king's title from the acceptance of the ſecond benefice, whereby the firſt was void, and ſo remained void 21. *Jac.* 1. and pleads the general pardon of 21. *Jac.* 1. and that the ſaid *Shilton* was not a perſon excepted in the pardon, nor the ſaid cauſe of lapſe excepted: and that *John Shilton*, ſo being incumbent, reſigned that benefice of *Ichingſtock*, and gave title to *John Fayle* to preſent; who, upon the ſaid reſignation, preſented the defendant, who was admitted, inſtituted, and inducted before the writ of the king, &c.

To this the attorney general replies, ſhewing the exception in the pardon, wherein is excepted "all titles and actions of *quare* "*impedit*, others than ſuch actions of *quare impedit* which the king "hath or may have *ratione lapſus* incurred *ultra* three years laſt "paſt, for or concerning any benefice whereof any incumbent then "was, or the laſt day of the parliament ſhould be, in actual poſ-"ſeſſion, by the preſentation of any patron, or the collation of any "ordinary;" and that the ſaid church being ſo void by lapſe, *John Fayle* preſented, &c.; and traverſeth, that the ſaid vicarage of *Ichingſtock vacavit per reſignationem* of the ſaid *John Shilſton*. Upon this replication the defendant demurred.

After divers arguments at the bar, and twice argued at the bench in the common pleas, and the Judges being divided both times, *viz.* RICHARDSON, *Chief Juſtice*, and HARVEY, *for the plaintiff*, and HUTTON and YELVERTON, *for the defendant*; and afterwards SIR ROBERT HEATH, *Chief Juſtice* of the common pleas, and HARVEY, *for the plaintiff*, and HUTTON and VERNON, *for the defendant*; by reaſon of this difference in opinions, it was adjourned into the exchequer chamber, and argued there at the bar; and afterward

terward by all the Juſtices of both benches and Barons of the exchequer, *viz.* by SIR THOMAS RICHARDSON, *Chief Juſtice* of the king's bench, SIR ROBERT HEATH, *Chief Juſtice* of the common pleas, SIR HUMPHRY DAVENPORT, *Chief Baron* of the exchequer, and by all the other Juſtices and Barons; and two main queſtions were made.

THE KING *againſt* THE ARCHBISHOP of CANTERBURY.

FIRST, If an avoidance of a church happening and continuing void divers years, ſo as the king hath title to preſent by lapſe, and the king doth not take advantage thereof, but dies, Whether the ſucceeding king may take advantage of this lapſe, or be barred by the ſtatute of 25. *Edw.* 3. c. 1.? And that reſted only upon the expoſition of the ſaid ſtatute, the words whereof are, "And touching preſentments to be made by the king or his heirs to any benefice in another's right, by *old titles*, the king granteth, that from henceforth he nor any of his heirs ſhall not take title to preſent to any benefice in another's right of any time of his progenitors; nor that any prelate is bound to receive, &c.; but that the king and his heirs be for ever hereafter clearly barred of all ſuch preſentments, ſaving always to him and his heirs all ſuch preſentments in another's right fallen, or to fall, of all his time, and of the time to come." It was ſtrongly urged at the bar, and alſo at the bench, by thoſe who argued for the defendant, that this ſtatute extends to all the ſucceſſors and heirs of king *Edward* the third, that none of them may preſent to a church in another's right (as they argued that this church is), becauſe the king hath not that title as to this proper advowſon, but in right of him who hath the inheritance to any church which falls in time of his progenitors; and the rather, for that in the abridgement of the ſtatutes in the book of the ſtatutes, this ſaving is altogether omitted; ſo they conceived, the king was bound by the expreſs words of the ſtatute, and that there is not any ſuch ſaving. VERNON, *Juſtice*, continued of this opinion; but HUTTON, who argued in the common pleas for the defendant in this point, that the title of the king was bound by the ſaid ſtatute, and that he might not have title to preſent to a church fallen in the time of his predeceſſor, by reaſon of his title of lapſe fallen in the time of his predeceſſor, now changed his opinion. And all the other JUSTICES AND BARONS, except VERNON, argued *for the plaintiff* in this point, that the king hath good title to preſent by lapſe incurred in the time of his predeceſſor, and is not reſtrained by the 25. *Edw.* 3. c. .; for by the expreſs words of the ſtatute all rights and titles to preſent in his own time (*viz.*) until before the ſtatute, and in his time after, and all his heirs (*viz.*) after the death of *Edw.* 3. are ſaved; and it ſhall not bar the titles which the king had in "another's right, "fallen or to fall in his own time, or in the time of his heirs." And that there was ſuch a ſaving, appeared by the copy out of the parliament roll, and by an ancient book in the exchequer, writ in parchment, where it is writ with a ſaving: and they held, that theſe words of "*old titles*," is intended in the time of the progenitors of king *Edward* the third, and not of any titles of preſentments to fall in the time of *Edward* the third, or of any of his heirs, but intended to exclude king *Edward* the third and all his heirs

The king's ſucceſſor may preſent to a benefice upon a lapſe to his predeceſſor.

11. *Hen.* 4. pl. 7. Jones, 337. 3. Com. Dig. 199. 201. 2. Bl. Com. 273.

8. Co. 28. a.

THE KING *against* THE ARCHBISHOP of CANTERBURY.

heirs from titles of preſentation in others right, fallen before the time of king *Edward* the third, whereof any church was full, and which title is only in another's right; and that was the expreſs intent of the ſtatute, *viz.* to take away the ſtatute of 14. *Edw.* 3. c. 2. in this point. And BERKLEY and ſome of the Juſtices doubted, whether a preſentation by lapſe ſhall be ſaid to be in another's right, but only preſentments by reaſon of guardianſhip and temporalties in the king's hands; but all the other Juſtices and Barons agreed, that it ſhall be ſaid to be in another's right; for although he preſents *ratione prærogativæ*, yet he preſents as in the right of the patron: ſo it is where one preſents by reaſon of a church being void after forfeiture for alienation without licence, or for outlawry; and for that was cited 14. *Edw.* 3. "*Quare Impedit*," 54. 22. *Hen.* 6. 29. 21. *Eliz. Dyer*, 364.: and for the principal point they relied upon 11. *Hen.* 4. 7. where it is ſo reſolved, 7. *Hen.* 4. 25. 18. *Eliz. Dyer*, 347. 7. *Co.* 28. a. and many precedents where the king makes title to preſent by lapſe and title in another's right. Wherefore for this point RICHARDSON, *Chief Juſtice* (who argued alone in one day), ſaid, it is to be taken for clear law, that the king hath good title to preſent; and the declaration was good notwithſtanding that objection.

If an incumbent accept a plurality, the church becomes void by the ſtatute of 21 *Hen.* 8. c. 13. and the patron ought to preſent within 6 months after the avoidance, which he may do without ſentence of deprivation, for he is bound to take notice of this avoidance at his peril; but neither the intereſt of the patron or the king ſhall be diſcharged by a general pardon.

4. Co. 75. Jones, 337. Dyer, 237. 2. Inſt. 632.

THE SECOND QUESTION was, If *Shilſton* were incumbent and might reſign, Whether by his reſignation the church is become void? And that reſted upon the expoſition of the ſtatute of 21. *Jac.* 1. c. . of the general pardon, and the ſtatute of 21. *Hen.* 8. c. 13. of pluralities, Whether the church was abſolutely void by acceptance of a ſecond benefice, being both with cure; and if the pardon unto him, being in poſſeſſion, may make him incumbent?

This point was argued ſtrongly in the common pleas by YELVERTON and HUTTON, and afterwards there by VERNON and HUTTON, and by both of them in the exchequer chamber, *for the defendant*, that this church, by the 21. *Hen.* 8. c. 13. was not abſolutely void in fact, but is voidable *quoad* the patron, that he may preſent by the ſtatute; but until he preſents, the other remains incumbent; and then he remaining incumbent, and for three years being in poſſeſſion of the church as incumbent until the pardon of 21. *Jac.* 1. and the pardon then coming, he being in poſſeſſion, eſtabliſheth him in poſſeſſion, and continues him incumbent; and he cannot afterward be ouſted by the king or any other; and then he is incumbent until he reſign: and therefore his plea is good, for he is out of the exception of the pardon, for he was in for three years before the pardon; and therefore they ſaid, he remained incumbent; that he might plead as incumbent by the ſtatute of 25. *Edw.* 3. c. . as he pleads here: alſo, he is incumbent as to all ſtrangers, but not as to his patron; for he may preſent before any deprivation, although a ſtranger cannot, becauſe the church remains full againſt him: and he is incumbent ſo as he may take a releaſe of any annuity iſſuing out of the parſonage, and is chargeable in an annuity, and is chargeable to the payments of ſubſidies and fifteenths; and may have an action of debt againſt any of his pariſhioners for not ſetting out their tithes:

THE KING *againſt* THE ARCHBISHOP OF CANTERBURY.

Moor, 441.

4. Co. 75. b. 2. Wilſ. 174. 3. Burr. 1504. 1509.

3. Com. Dig. 200. 210.

Aſſ. 356.

4. Com. Dig. 318.

Hob. 167.

tithes; and many other reaſons they alledged, and ſaid, that the penning of this ſtatute differs much from the ſtatute of 31. *Eliz.* c. 6. of Simony, and from the 13. *Eliz.* c. 12. for not reading of the Articles: wherefore they concluded, that judgment ought to be given for the defendant. But all the other JUSTICES AND BARONS argued againſt it; for they all held, that the church was abſolutely void *in facto et jure* by taking of the ſecond benefice, and THAT by the expreſs words of the 21. *Hen.* 8. c. 13.: for at the common law, before the ſaid ſtatute, by reaſon of the canons and conſtitutions eccleſiaſtical, the firſt church was *in jure* void, ſo as the patron might preſent thereto if he would; but becauſe it was an eccleſiaſtical conſtitution, the patron was not compellable to take notice of that avoidance until deprivation and notice thereof given him, and then after deprivation the church is void *in facto et jure*, and the patron at his peril ought to preſent. And this appears by the Books 9. *Edw.* 3. 2. 5. *Edw.* 3. 9. 10. *Edw.* 3. 1. 24. *Edw.* 3. 30. 11. *Hen.* 4. 37. *F. N. B.* 34. *L.* 14. *Hen.* 7. 28. Now by the 21. *Hen.* 8. c. 13. it is made abſolutely void after admiſſion, inſtitution, and induction; ſo it is void *facto et jure*, and the patron at his peril ought to take notice thereof and preſent within the ſix months, otherwiſe a lapſe incurs. And that it was void to all purpoſes abſolutely, appears by the manner of pleading in this and all other ſuch caſes, that by the admiſſion, inſtitution, and induction to the ſecond benefice, *prima eccleſia vacavit de perſona* of the incumbent, *et vacans continuavit*; ſo the church is abſolutely void by the pleading and confeſſion of the defendants. And this appears by the Books ſince the ſtatute of 21. *Hen.* 8. that by the acceptance of a ſecond benefice the church is void *facto et jure quoad* the patron and all others. *Dyer*, 347. 4. *Co.* 75. *b. Holland's Caſe*, and 4. Co. 79. *b. Digby's Caſe*. 6. *Co.* 29. *b. Green's Caſe*, and *Dyer*, 377. and *Co. Entries*, 368. And for the reaſons before alledged on the other ſide, *viz.* that he may plead as incumbent, that is becauſe he is admitted by the writ to be incumbent, and his pleading as incumbent is not contradicted: and for the taking of a releaſe, it is much to be doubted; and if it be good, it is becauſe he is in poſſeſſion as an intruder, to whom a releaſe may be a diſcharge of ſuch things: and for his being charged with ſubſidies, that is becauſe he hath the profits, and therefore reaſonable he ſhould bear and pay the charges. And *quoad* his having debt for not ſetting forth tithes, it was denied by all thoſe who argued on the other ſide. And as to the pardon of 21. *Jac.* 1. all the other Juſtices and Barons held, that the pardon doth not help him: FIRST, Becauſe it is no offence within the body of the act; for it is not any offence or contempt againſt the king. SECONDLY, Becauſe it never was the intent of the pardon to diſpenſe with pluralities; nor are there any words therein to make him an incumbent, or to make a plenarty of a church which was abſolutely void. And divers of the Juſtices and the Chief Baron held, that a ſpecial pardon after ſuch an abſolute avoidance, with words "that he "may retain," or whatſoever other words he may have, cannot make him incumbent. So the general words in the pardon ſhall not inure to make a diſpenſation, and the church, being once void, ſhall not be full without a new preſentation, admiſſion, and inſtitution. And for the words in the exception of the general pardon, of "all titles and actions of *quare impedit*," others than "ſuch

THE KING *against* THE ARCHBISHOP OF CANTERBURY.

"such titles and actions of *quare impedit* as have incurred by lapse "above three years before the first day of this parliament, whereof "any incumbent is in actual possession by any presentation or "collation," &c. the last parts of this exception do not extend to the said *Shilton*; for that extends only to those who are in as incumbents (which he is not), and not to those who are in as incumbents by usurpation and wrong, which are removeable by *quare impedit*, and which may not be removed without *quare impedit*. And it was said, that since the statute of 21. *Hen.* 8. there have been divers general pardons, and no pluralities were ever conceived to be within them. Wherefore they concluded, that judgment should be given for the plaintiff; and it was adjudged accordingly.

CASE 84.

The Earl of Kent *against* Robert Steward and Scott.

Hilary Term, 8. *Car.* 1. *Roll* 235.

If *A.* being seised in fee of the manors of *B.* and *C.* levies a fine to *D.* of both the manors, upon a purchase made by *D.* of the manor of *B.* only, intending the manor of *C.* only as a security to the purchasor, and limits the manor of *B.* to the use of *D.* and his heirs, and the manor of *C.* to the use of *A.* until the wife of the said *A.* should expel the said *D.* his heirs, and assigns, and after such eviction, to the use of *D.* his heirs, and assigns, until he should be satisfied from the profits for the damages of such eviction; this is only a contingent use of the manor of *C.* and therefore nothing vests in *D.* until such eviction happen.

TRESPASS. Upon a special verdict the case was, *Francis Babington*, seised in fee of the manor of *Kingston* in the county of *Nottingham*, and of the manor of *Asheton* in the county of *Derby*, of which manor of *Asheton* the place WHERE is parcel, by fine, 41. *Eliz.* conveyed the said two manors to GILBERT *Earl of Shrewsbury* and his wife, to the uses following, *viz.* of the manor of *Kingston*, to the use of them, their heirs, and assigns; and of the manor of *Asheton*, to the use of the wife of *Babington* for her life, and after to the use of the heirs of *Francis Babington*, until *Julian*, wife of *Francis Babington*, shall evict and expel the said earl or countess, their heirs or assigns, their farmors, tenants, or lessees, of or from the manor of *Kingston*, or any parcel thereof; and after such eviction, then to the use of the said earl and his wife, their heirs, and assigns, until they should be satisfied with the profits for their loss. *Francis Babington*, for money by fine, in *Hilary Term*, 43. *Eliz.* conveys the manor of *Asheton* to *Sir Thomas Reisbie* and his heirs, to the use of him, his heirs, and assigns. The *Earl of Shrewsbury* and his wife, by fine, in *Trinity Term*, 43. *Eliz.* conveys the manor of *Kingston* to the use of *the Earl of Kent* and his wife, and the heirs of *the Earl of Kent*. Upon the first of *April*, 17. *Jac.* 1. *Sir Thomas Reisbie* deviseth the manor of *Asheton* to *Sir Francis Wortley* and to others for two thousand years. Upon the first of *May*, 17. *Jac.* 1. *Sir Thomas Reisbie* died seised of the said manor of *Asheton*. Upon the first of *September*, 17. *Jac.* 1. *Francis Babington* died: after his death, 20. *Jac.* 1. *Julian*, the wife of *Francis Babington*, evicted from *the Earl of Kent* in dower parcel of the manor of *Kingston* of the value of two hundred pounds *per annum*, and enters. *The Earl of Kent* enters into the manor of *Asheton* upon the defendants, being assignees of the said lease, who re-entered; and he brings this action.

And, Whether his entry be lawful? was the question.

And, after argument divers times, IT WAS ADJUDGED for the defendants, that the entry of the earl was not lawful. The main question was, the limitation of *Asheton* being to the use of the wife of *Babington* for life, and after to the use of the right heirs of

2. Rol. Ab. 792. Plowd. 345, 483. Cro. Eliz. 511. Cro. Jac. 591. Co. Lit. 205. 10. Mod. 419.

Babington,

THE EARL OF KENT *againſt* STEWARD and SCOTT.

Babington, until the ſaid wife of *Francis Babington* ſhould evict *the Earl of Shrewſbury* and his wife, their heirs or aſſigns, their farmors or tenants, of or from the manor of *Kingſton*, or any part thereof, Whether *the Earl of Kent*, as aſſignee, may take the benefit thereof?—And in this point ALL THE JUSTICES unanimouſly reſolved, that he as aſſignee might not enter, but that the uſe upon the eviction ought firſt to veſt in *the Earl of Shrewſbury* and his heirs, and that this conveyance before the eviction cannot give to him title of entry as aſſignee; for the words "*heirs and* "*aſſigns*" are to be taken as words of limitation, *viz.* that *the Earl of Shrewſbury* by his entry ſhall have it by limitation to him, his heirs, and aſſigns; and it ſhall not firſt veſt in the aſſignee as purchaſer; and it is not ſuch intereſt which is aſſignable over before eviction; and the power of entry is not transferred with the eſtate of *Kingſton*. But whether the conveyance of the manor of *Kingſton*, and the conveyance of the manor of *Aſheton* by *Francis Babington*, before any eviction, hath deſtroyed the privity of entry after eviction (the eſtate being transferred to another before the eviction), they did not deliver any opinion, nor agreed. But for the firſt cauſe they all agreed, that *the Earl of Kent* hath no title of entry as aſſignee, and therefore for that cauſe it ought to be adjudged againſt him. *Vide* 1. *Co.* 135, 136. *Chudley's Caſe*. *Plowd.* 483. *Nicholſon's Caſe*. 8. *Co.* 75. *Lord Stafford's Caſe*. 10. *Co.* 51. *Lampet's Caſe*. 4. *Co.* 66. 5. *Co.* 95. *Plowd.* 345. *Brett's Caſe*.

Eaſter Term,

10. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

The King *againſt* Bagſhaw.

CASE 1.

Vide Ante, page 347.

THE iſſue being joined, Whether there were ſuch a cuſtom as is pleaded? LITTLETON, the *Recorder of London*, certified, *ore tenus*, that there was not any ſuch cuſtom generally; for he ſaid, that the cuſtom is not, that one brought up as an apprentice in the trade of a goldſmith, cutler, &c. being a freeman of *London*, by colour thereof may uſe any other manual trade; but one of a trade who uſeth buying and ſelling, may exerciſe another trade of buying and ſelling. But this he did not mention in his certificate, but generally, *ore tenus*, certified, that there is no ſuch cuſtom as is pleaded.

A citizen of *London* cannot exerciſe a trade of a different ſpecies to that in which he was apprentice. Poſt. 527.

R. 284. 1. Roll. Ab. 579. 2. Com. Dig. 16. 4. Com. Dig. 199.

Mackaller *againſt* Todderick.

CASE 2.

Ante, Pages 337. 353.

AND now THE COURT was of opinion, that the conſideration was illegal, and that the action lies not; for the conſideration to have money to procure him to be rector of the church, is a ſimoniacal contract, and an unlawful act condemned by all laws. And where it was alledged, that ſimony is ſuch a ſpiritual thing and ſuch an offence whereof the common law takes not any notice, at leaſtwiſe did not before the ſtatute 31. *Eliz.* c. 6. that was denied.

To procure another to be preſented to a donative in the king's gift is an illegal conſideration. Ante, 229. Poſt. 426.

Jones, 541. 1. Roll. Ab. 18. 2. *Hen.* 4. *pl.* 9. 10. Co. 99. 2. *Hen.* 5. *pl.* 10. Cowp. 39. er, 355.
And ſee the ſtatute 12. Ann. ſt. 2. c. 12.

SECONDLY, It was held, that this declaration is not good, for that the promiſe is to pay him after he is rector; and he ſhews, that he was rector by his procurement upon this promiſe, which cannot be; for he never was rector, but a perſon utterly diſabled to be a parſon by this ſimoniacal contract; as in 23. *Eliz.* for not reading of Articles, and in *Vernon's Caſe* (*a*) for the buying of offices.—Whereupon it was held to be error, and the judgment was reverſed.

Repugnancy in pleading.

(*a*) Co. Lit. 234. 1. Hawk. P. C. 313. 3. Bac. Ab. 731.

Case 3.

Ward *against* Petifer.

If a man hath the grant of the *first graſs*, or *prima tonſura*, that grows on the land every year, he may recover it in *ejectment*; for the freehold is in him who hath the *firſt tonſure*.
Poſt. 492. 546.
1. Roll. Ab. 829.
Hardres, 330.
2. Lev. 213.
2. Sid. 416.
Daliſ. 95.
4. Leon. 43.
Noy, 54.
Co. Lit. 41. b.
5. Com. Dig. 273.
2. Stra. 1120.
2. Bac. Ab. 166.

EJECTMENT upon a leaſe for five years by the vicars choral in *Litchfield*, of parcel of a meadow called the *Parſon's Hayn*, in *Cheſterton*. Upon not guilty pleaded and evidence to the jury at the bar, the defendant pretended, that the leſſors had not the intereſt of the ſoil, but that the freehold was in *Sir Edward Peto*, and that the ſaid leſſors had only *primam tonſuram* of the ſaid land from the *hayning* until the crop mowed and carried away, for they never had other profit thereof, but that *Sir Edward Peto* had all the profit thereof for the reſidue of the year; and then an ejectment being brought of the land itſelf, will not lie.

Therefore they endeavoured to prove, that *Sir Edward Peto*, being lord of the ſaid manor, uſed every year, after the crop taken away, to feed the meadow with cattle, and to take the trees and buſhes growing thereupon.

But on the plaintiff's part it was confeſſed, that they had only the firſt crop, but that they uſed to *hayn* it ſooner or later at their pleaſure, and to keep it longer or ſhorter time uncut according to the ſeaſonableneſs of the year, which proves that the freehold was in them who had the firſt crop.

And ALL THE COURT was of this opinion, that properly, unleſs other matter be ſhewn to prove the contrary, the freehold is in him who hath *the firſt tonſure*, for that is the moſt beneficial part of the year, and thoſe who have the after-paſture have but the profits in nature of common; but admitting he hath but the firſt crop, yet they held, that he may well have an ejectment thereof. Yet THE COURT adviſed the jury, that if they conceived the vicars had only *the firſt crop*, and not *the entire profits* through all the year, as the evidence whereby the defendants claim (which was a leaſe in 29. *Hen.* 8. whereby he let the rectory and tithes, except the *Parſon's Hayn*, which was the land in queſtion, for forty-two years, and after a conveyance of the *Parſon's Hayn*, 5. *Edw.* 6.) imports, then they ſhould find this matter ſpecially, and leave it to the law, Whether an ejectment lies in this manner? But if they conceived the entire land for all the year to be appertaining to the vicars, then they might give a general verdict.—And afterwards the jury found *a general verdict* for the plaintiff.

Case 4.

Goldſmith *againſt* Ellen Sydnor, Adminiſtratrix of William Sydnor.

Michaelmas Term, 9. *Car.* 1. *Roll*

To debt on a *bond* againſt an adminiſtratrix, if the defendant plead that there is a *ſtatute ſtaple* and a *judgment* yet unpaid, and no aſſets *ultra*, the plaintiff may reply, that there was a defeaſance on the ſtatute, and that the defendant hath ſufficient to ſatisfy the plaintiff and the ſaid judgment.—1. Roll. Ab. 925. Stiles, 143. 1. Brownlow, 51. 2. Term Rep. 690. 3. Term Rep. 685.

DEBT upon an obligation. The defendant pleaded, that *William Sydnor*, the inteſtate, on the 16. *May*, 9. *Car.* 1. before ROBERT HEATH, *Chief Juſtice* of the common pleas, acknowledged himſelf bound to *Edward Hobert* in four hundred pounds to be paid at *Penteceſt* next enſuing; *et ſi deficerit, &c. voluit et conceſſit per ibidem ſcriptum, quòd incurreret ſuper ſe, hæredes, et executores, pœnam in ſtatuto Stapul. &c.* and further pleaded a judgment againſt him in debt for two hundred pounds, at the ſuit of *Richard Hobert*

in

in the common pleas; and that the said *William Sydnor* in his life did not pay the said debt of four hundred pounds, nor any part thereof; and that the said statute remains in force; and that she hath no goods unadministered except to the value of one hundred pounds, which are liable to the execution upon the said statute and judgment; *et hoc paratus est verificare.*

GOLDSMITH *against* SYDNOR.

1. Mod. 186.

The plaintiff replies, *quod bene et verum est* that the said *William Sydnor*, by the said recognizance, acknowledged himself bound to the said *Edward Hobert*, &c. but that there was a defeasance betwixt them, that if he had paid one hundred pounds to one *Edward Leythorp* upon the first of *June* 1635, and should save him harmless, &c. that the said statute should not be forfeited; and that the defendant hath sufficient to satisfy the plaintiff and the said judgment.

The defendant hereupon demurred.

GRIMSTON now argued, that this statute, not being yet forfeited, is not pleadable; and relied upon *Harrison's Case* (*a*).

In the administration of an intestate's effects, a *statute staple* shall be paid before a debt on specialty, though the statute is not yet due.

But THE COURT, in this point, held, that there is a difference betwixt this case and *Harrison's*, which was a statute with a defeasance for the performance of covenants, which peradventure never should be broken, and therefore it shall be no plea to bar: but here is a statute for the payment of money absolutely at a day certain; which is allowable before debts upon an obligation.

Swinb. 370. 3. Lev. 57. Cro. Jac. 9. 35. Cro. Eliz. 315. 1. Roll. Ab. 942. 1. Com. Dig. 245. 5. Com. Dig. 203.

In pleading a statute staple, it must be said *per scriptum suum obligatorium*, or, *secundum formam statuti.* Ante, 209. Moor, 811.

But ROLLE, *for the plaintiff*, then took an exception to the plea in bar, that the pleading of the statute was not good, because it is not said, "*per scriptum suum obligatorium*," nor "*secundum formam statuti.*"—ALL THE COURT was of this opinion (*b*). For this cause, therefore, a rule was given, that judgment should be entered for the plaintiff, unless good cause were shewn, &c.

Afterward, upon a second motion, judgment was given for the plaintiff, for this insufficiency and exception to the plea in bar, by RICHARDSON, JONES, and BERKLEY; but *I* conceived, that the plea being but a plea in bar, and it being mentioned that he acknowledged, if he failed of the payment, the penalty in the statute staple should incur upon him, it cannot be intended but to be a statute acknowledged according to the form of the 23. *Hen.* 8 c. 6.; and the rather, because it is said, *quod post recognitionem prædictam* such a defeasance was made; so he admits it to be a recognizance. But notwithstanding it was adjudged for the plaintiff.

(*a*) 5. Co. 28. (*b*) *Vide* 4. Co. 64. Fulwood's Case.

Boreton *against* Nicholls and Others.

CASE 5.

Easter Term, 7. *Car.* 1. *Roll* 115.

ERROR of a judgment in the common pleas in an ejectment. The case was, *James Beck*, clerk, was seised in fee of lands in *Moreton-in-Marsh*, being the lands in question, and had issue *Job* his eldest son, and *James* his second son, and by indenture dated the 5th *March*, 8. *Jac.* 1. infeoffs of those tenements *Sir Nicholas* remainder to the use of the first son begotten of the body of *B.* that should have heirs male to his heirs *in perpetuum*; and *in default of such issue of his body*, to the use of the first which should have issue begotten of her body; and in default of such issue, remainder to *B.* The limitation to the first son gives such first son only an *estate tail*; and therefore remainder to the right heirs of *B.* became vested in him. Post. 401.—Ld. Raym. 209. 3. 4. Bac. Abr. 314. 1. Peere Wms. 74.

A. makes a feoffment to the use of himself for life, remainder to the use of *B.* for life, of his body, and daughter of *B.* the right heirs of the subsequent Com. Dig. 230.

BORETON *againſt* NICHOLLS.

Overbury and others to the uſes in the indenture, *viz.* to the uſe of the ſaid *James Beck*, clerk, the father, for his life, without impeachment of waſte; and after, to the uſe of *James Beck* the ſecond ſon for his life; remainder after his deceaſe to the uſe of the firſt ſon of the ſaid *James Beck* the ſon which ſhould have iſſue male of his body, and to his heirs for ever; and for want of ſuch iſſue, the remainder to the uſe of the firſt daughter of the ſaid *James Beck* the ſon which ſhould have iſſue of her body, and to her heirs for ever; and for default of ſuch iſſue, the remainder thereof to the right heirs of the ſaid *James Beck* the ſon for ever. They find, that *James Beck*, clerk, the father, was ſeiſed for life; the remainder to *James Beck* his ſecond ſon for life; the remainder over, &c. *prout*; that the ſaid *James Beck*, clerk, the father, died ſeiſed, the ſaid *Job Beck* being his ſon and heir; and that the ſaid *Job* had iſſue *Henry Beck* the leſſor, and died: that the ſaid *James Beck*, ſon of the ſaid *James Beck*, clerk, entered after the death of his father, and had iſſue *James Beck*; and that the ſaid *James Beck* the grandſon died without having iſſue; and that the ſaid *James Beck* the ſon, after the death of the ſaid *James Beck* his ſon, ſo ſeiſed, levied a fine of thoſe tenements *ſur cogniſance de droit come ceo*, &c. with proclamation, 21. *Jac.* 1. to *Richard Brett* and *William Wheeler*, who entered by force of the ſaid fine; and the ſaid *Henry Beck*, the ſon of *Job Beck*, entered upon them, and demiſed to the plaintiff for years, upon whom the defendant, by the command of the ſaid *Richard Brett* and *William Wheeler*, entered and ouſted the ſaid leſſee; and that the ſaid *James Beck*, ſon of the ſaid *James Beck*, clerk, is yet alive. *Et ſi ſuper totam materiam*, &c.

Lit. Rep. 159. 253. 285. 315. 344.

Fearne's Eſſay on Con. Rem. 4th edit. 514.

Upon this verdict, after divers arguments in the common pleas, IT WAS ADJUDGED for the defendants, that this remainder to the younger ſon, who ſhould have iſſue, is but a contingent remainder, and a remainder to the right heirs veſted in *James* the ſon; and that his fine is no cauſe of forfeiture, nor that the ſaid *Henry*, as heir of *Job*, might take advantage of the forfeiture. This judgment being moved by a writ of error into the king's bench, it being once argued at the bar, without much difficulty the judgment was this Term affirmed.

1. Co. 66. b. Ante, 24. Co. Lit. 319. b. 1. Peere Will. 70.

Trinity

Trinity Term,

10. Car. I. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

William Noy, *Eſq. Attorney General.*
Sir Richard Sheldon, *Knt. Solicitor General.*

Burgeſs's Caſe.

CASE 1.

On error to reverſe an outlawry upon manſlaughter, the perſon is entitled to the aſſiſtance of counſel. Ante, 134. 147.

2. Jones, 150. 1. Roll. Ab. 576. 9. Co. 31. b. 2. Hawk. P. C. ch. 50. ſ. 6. & ch. 39. ſ. 5.

BURGESS being outlawed upon an indictment of manſlaughter, in the county of *Middleſex*, brought a writ of error to reverſe the outlawry, and aſſigned for error, That he was over the ſeas at the time of the outlawry, *viz.* at UTRICK, *in partibus tranſmarinis.* Hereupon counſel being appointed for the priſoner to plead, and the error aſſigned, the king's attorney takes iſſue, that he was here in *Middleſex* at the time of the outlawry, and traverſeth his being at *Utrick*, *prout.* Whereupon iſſue being joined, and a jury of *Middleſex* at the bar the firſt day of this Term,

CALTHROP, being aſſigned of counſel for the priſoner for aſſignment of error, offered in evidence a certificate under the ſeal of the ſaid town.

JONES, *Juſtice*, moved it as doubtful, whether he might have counſel upon his trial; but all the other Juſtices held clearly, that he ſhall have it, when the trial is not upon the fact in the indictment, but upon collateral matter, *viz.* of his being beyond ſeas.

Certificate under the ſeal of the town no evidence of the priſoner's being abroad, except it be proved, and the priſoner identified.

Cro. Jac. 541. 2. Roll. Rep. 346.

And ALL THE JUSTICES held, that it is not material in what place beyond ſeas he was, ſo as he was over the ſeas; and that the certificate under the ſeal of the town where he was reſident, without oath of the truth thereof, and one ſworn for the expoſition of it into *Engliſh*, is not allowable; but a witneſs being ſworn, ſaid certainly, that he was there in ſervice at the time of the outlawry and before: whereupon the jury gave their verdict accordingly; and then he was inſtantly arraigned upon the indictment, and pleaded, &c. (*a*).

(*a*) 2. Hawk. P. C. ch. 50. ſ. 17. 3. Bac. Abr. 777.

The Caſe of Langforth Bridge.

CASE 2.

Information for not repairing an *ancient bridge.* The plea muſt *directly* anſwer or traverſe that it is not an ancient bridge, and ſhew who is bound to repair.

INFORMATION againſt the inhabitants of the county of *Middleſex* for not repairing of *Langforth Bridge*, which by the information was ſuppoſed to be an ancient bridge, and time out of mind had been uſed to be repaired by the inhabitants of that county.

The defendants, *proteſtando* that it is not an ancient bridge, for plea ſay, that it lately was erected by the king for the benefit of his mills.

10. *Edw.* 4. 5. 12. 30. *Edw.* 3. 14. 32. Aſſ. 9. 9. *Hen.* 6. 59. Plowd. 296. Co. Lit. 126. Doc. Plac. 295. Salk. 359. 2. Inſt. 701. 6. Mod. 307. 2. Bl. Rep. 685. Burr. 2594. Ld. Raym. 865. 1. Hawk. P. C. 443. Cowp. 111.

NOY,

The Case of Langforth Bridge.

NOY, *the King's Attorney*, hereupon demurred, Becauſe he doth not anſwer that it was an ancient bridge, but by *proteſtation*, which being the ſubſtance of the information, ought to be ſpecially anſwered or traverſed.

2. Com. Dig. 400.

SECONDLY, That the county ought to maintain bridges (*a*), becauſe they be for the eaſe and benefit of the people, unleſs it be ſhewn who ought to repair them: and to that purpoſe he cited 10. *Edw.* 3. *pl.* 28. and an ancient record for *Bow-Bridge*, 8. *Edw.* 2. in this court, that the jury found it was to be repaired by the *Abbey of Dertfort*, and 37. *Aſſiſ.* and a record in 5. *Hen.* 5. in the exchequer.

ALL THE COURT thereupon held the plea to be ill; and rule was given, that judgment ſhould be entered for the king, unleſs, &c.

(*a*) See 22. *Hen.* 8. c. 5. 1. Ann. c. 18. 12. Geo. 2. c. 29. and 14. Geo. 2. c. 33. 1. Hawk. P. C. ch. 77.

Case 3.

Sir Edward Duncomb's Caſe.

The owner of the land over which there is an open road may incloſe the land; but he muſt leave a ſufficient way, and repair it at his own charge. Ante, 366. 1. Roll. Ab. 390. Jones, 296. 22. Aſſ. 92. 1. Sid. 464. 2. Saund. 160. Ld. Raym. 1170. 2. Com. Dig. 399. Dougl. 745. 1. Hawk. P. C. 367, 368. *Sed vide* Burr. 461. to 466. *contra.*

SIR EDWARD DUNCOMB being indicted, for that there being an ancient highway in *Batleſdon*, he had incloſed his lands on both ſides thereof, whereby he had ſtraitened it, and the way was become *luteſa et founderoſa*, whereas by the law of the land he ought to have made it a ſufficient way:

Upon not guilty pleaded, it appeared, on evidence to the jury at the bar, to be a way betwixt two lands ends in the common field, and that it was but four yards wide. But it was proved, that although he had made a cauſeway reaſonably good at his own charge for horſemen, yet carts and coaches might not paſs, nor could meet for the ſtraitneſs thereof, nor might go beſides the way. And although it was alſo proved, that by this charge he had made it better than it was before, yet becauſe he had made the hedges and the incloſure in that manner, he at his peril ought to maintain the way: and whereas before the pariſh was chargeable with the reparations, now by this incloſure he is bound to repair it and make it a good way, and maintain it at his own charge and peril only.

NOY, *Attorney General*, ſaid, it was ſo reſolved in 6. *Jac.* 1. and 19. *Jac.* 1. upon conference with all the Juſtices of *England*; which RICHARDSON, *Chief Juſtice*, affirmed.

Case 4.

William Seagood *againſt* Hone and Alice his Wife.

Michaelmas Term, 8. *Car.* 1. *Roll* 195.

A ſurrender to the uſe of *A.* and *B.* and the longeſt liver of them, and *for want of iſſue of the body of B.* the remainder to *C.* is good, notwithſtanding a clauſe that it ſhall not be in force till after the death of the ſurrenderor. Noy, 152. Ld. Raym. 44. 1347.

EJECTMENT for lands in *Tuddington* of a leaſe of *Henry Seagood* for three years. Upon not guilty pleaded, and ſpecial verdict, the caſe was,

John Reve, copyholder in fee of the manor of *Tuddington* (where the cuſtom was found to be, that any copyholder might ſurrender out of court into the hands of two tenants, copyholders of the manor, to the uſe of any other), ſurrendered into the hands of two ſuch tenants of the manor the ſaid tenements to the uſe of *Francis Reve*, and *John Reve* ſon of the ſaid *Francis*, and of the longeſt liver of them both: and for want of iſſue of the ſaid *John*

1. Roll. Ab. 849. 2. Roll. Ab. 61. Co. Copy. 97. Jones, 342. 1. Brownl. 127. Cro. Eliz. 29. 255. Cro. Jac. 376. 1. Saund. 151. March, 177.

Reve

Reve the ſon, of his body lawfully begotten, the lands to remain to the younger ſon of *Mary Seagood*, wife of *William Seagood*; this ſurrender not to ſtand and be in full force until after the death of *John Reve*. *John Reve* died, and the ſurrender was preſented at the next court; and *Francis Reve* and *John Reve*, ſon of the ſaid *Francis*, were admitted tenants to them and the longer liver of them, and to the heirs of the body of the ſaid *John Reve* the ſon, the remainder to the younger ſon of the ſaid *Mary Seagood*. They alſo found, that *Francis*, and after *John Reve* died without iſſue; and that *Henry Seagood* was the younger ſon of the ſaid *Mary* at the time of the ſurrender, who was admitted tenant, and entered and made a leaſe for three years to the plaintiff; and that the ſaid *Alice*, wife to the defendant, is heir to the ſaid *John Reve*, and entered and ouſted the plaintiff: and if, &c.

SEAGOOD *againſt* HONE and his WIFE.

THE FIRST QUESTION was upon this clauſe, "This ſurrender "not to ſtand and be in full force until after the death of *John Reve*:" Whether the ſurrender be good, and that clauſe void?—And IT WAS RESOLVED, that the ſurrender was good; and that clauſe, being repugnant to the premiſes, ſhall be rejected as void and idle, and ſhall not deſtroy the premiſes. Jones, 326.

THE SECOND QUESTION was, Whether upon this ſurrender *John* had an eſtate for life only, or an eſtate to him and his heirs of his body?—And IT WAS RESOLVED, that *John* had but an eſtate for life; and being an eſtate for life limited by expreſs limitation, it ſhall not be an eſtate to him higher by implication: and although peradventure it might be further enlarged by implication in a deviſe, yet it ſhall not be ſo in a ſurrender or conveyance; in paſſing of which the party ought or might have had ſufficient counſel to direct him. Wherefore, for the two firſt points, it was reſolved for the plaintiff by the opinion of all the four Juſtices.

A deviſe to *A.* and *B.* and the longeſt liver of them, and for want of iſſue of the body of *B.* the remainder to *C.* conveys an eſtate for life only.

Cro. Jac. 416. 9. Co. 128. a. 1. Peere Wms. 74. 78. Cowp. 40. 234. 657. 3. Term Rep. 83.

But for the manner of the finding, JONES doubted whether it ſhould be a ſufficient ſurrender to the uſe of the plaintiff, becauſe the verdict finds, that it is cuſtomary land of the manor of *Tuddington*, and the ſurrender ought to have been into the hands of two tenants of the manor. But the copy of the ſurrender found, is *in hæc verba*: "TUDDINGTON." (*in the margent*) "At the court baron "of the honour of *Hampton*, *J. S.* and *J. D.* tenants of the ho- "nour of *Hampton*, do preſent, that *John Reve* did ſurrender into "the hands of the two tenants of the honour, &c." *ut ſupra*; and that being a court of the honour, and into the hands of the tenants of the honour, is not good.—But all THE OTHER THREE JUSTICES held, it was good enough; for "*Tuddington*" being in the margent, it ſhall be ſaid a diſtinct court by itſelf: for an honour conſiſts of many manors, yet all the courts for the manors are diſtinguiſhed and have ſeveral copyholders; and although there is for all the manors but one court, yet they are *quaſi* ſeveral and diſtinct courts: and ſo it was uſually in the time of the abbeys, that they kept but one court for many manors. Whereupon it was adjudged for the plaintiff.

If a lord hath ſeveral manors, he may, by cuſtom, hold courts in one of them for all the ſeveral manors.

4. Co. 27. a. Co. Lit. 27. a. 58. a. 2. Com. Dig. 503. 534.

Spirt

Case 4.

Spirt *againſt* Bence.

Hilary Term, 8. *Car.* 1. *Roll* 246.

On a deviſe of "all my paſture lands in *D.* to my youngeſt ſon *Henry*, AND ALSO all bargains, grants, covenants, which I have from *B.* my ſon *Henry* ſhall enjoy and his heirs for ever; and for lack of heirs of his body, then to remain to my ſon *Francis* for ever;" *Henry* ſhall have an *eſtate for life* only, and not an *eſtate tail* of the paſture by implication; for the heir cannot be diſinherited without a very clear and plain intent appears.

S. C. cited in Taylor v. Webb, Styles, 308. Vaugh. 262. 1. Mod. 177. 2. Bac. Abr. 67. Cowp. 234. 410. 657. Dougl. 321. 859. 2. Term Rep. 411.

ERROR of a judgment in the common pleas in an ejectment, where, upon a ſpecial verdict, the caſe was, *Thomas Cann*, being ſeiſed in fee of divers meſſuages and lands holden in ſoccage, and having three ſons, *Thomas*, *Francis*, and *Henry*, deviſed his lands in this manner: "I deviſe to *Thomas* my lands in *Horton*, to him and "his heirs males of his body; remainder to *Francis* and his heirs. "ITEM, I give to *Francis* my ſon my houſe in *Wickwarr*, to him "and to the heirs males of his body; and for lack of ſuch iſſue, to "my ſon *Henry* and the heirs males of his body. ITEM, I give to "my ſon *Henry* and his heirs freely my houſe in the borough of "*Wickwarr*, in which I dwell. ITEM, I give to my ſaid ſon "*Henry* my houſe and lands in *Impſteade*. ITEM, I give to him "two houſes in *Wickwarr*, in the tenure of *J. S.* ITEM, I give "to the ſaid *Henry* my paſtures called *The South-fields*, and one "meadow called *Warhay*, in *Wickwarr* (which are found to be the "land in queſtion), yielding the rents and ſervices therefore due. "ALSO I will, that all bargains, grants, and covenants which I "have from *Nicholas Webb*, my ſon *Henry* ſhall enjoy, and his heirs "for ever; and for lack of heirs of his body, to remain to my "ſon *Francis* for ever. ITEM, I will, That my wife *Margaret* "ſhall have the uſe and keeping of my ſon *Henry*, and of all the "premiſes to him bequeathed, during her natural life, paying "to him yearly for his maintenance eight pounds, training him "up in learning, and what more of her own pleaſure." The jury alſo find, that *Thomas Cann*, the deviſor, died in the year 1576: that the lands called *South-fields* and *Warhay* are the lands mentioned in the declaration; and that they are not parcel of the grants and bargains which *Thomas Cann* had of *Nicholas Webb*: that *Thomas Cann* the ſon had iſſue *Thomas Cann* the leſſor: that *Henry* entered into the lands in the declaration mentioned, and took the profits thereof, and was ſeiſed *prout lex*, &c.; and that afterwards the ſaid *Henry* took to wife *Elizabeth*; and that in 38. *Eliz.* in the life of *Margaret*, he infeoffed of the lands in queſtion *Richard Lothington* and *George White*, and their heirs, to the uſe of the ſaid *Henry* and *Elizabeth* his wife, and the heirs of their bodies, and after to the uſe of the heirs of *Henry*, with warranty to the feoffees and their heirs againſt all perſons: afterward, that *Margaret* died; and then *Henry* died without iſſue; and the ſaid *Elizabeth* ſurviving, held herſelf in, &c.: that *Thomas Cann* the leſſor was couſin and heir of the ſaid *Henry*, VIZ. ſon of *Thomas Cann*, ſon and heir of the ſaid *Thomas Cann*, the heir of the deviſor, and was of full age of one-and-twenty years at the time of the death of *Henry*: and that afterward the ſaid *Thomas Cann* entered, and made the leaſe in the declaration mentioned: and that the ſaid *Elizabeth* took to huſband the ſaid *Robert Spirt*, who thereupon re-entered; and that the ſaid *Elizabeth* is yet alive. *Et ſi ſuper totam*, &c.

After divers continuances, judgment in the common pleas was given for the plaintiff; and of this judgment a writ of error was brought, and the error aſſigned in point of law: and it was argued divers times at the bar, *viz.* by MAYNARD, MASON, and NOY, *Attorney*

Attorney General, for the plaintiff in the writ of error, and by GERMYN, MALLET, and CALTHROP, *for the defendant*. And in this Term it was openly argued at the bench two ſeveral days, *viz.* by BERKLEY and MYSELF the one day, and by JONES and RICHARDSON on another day. Two queſtions were made and argued.

SPIRT *againſt* BANCE.

FIRST, Whether *Henry* hath an eſtate for life only by this deviſe in the lands in queſtion, or an eſtate tail? for if he hath an eſtate tail, then it is a diſcontinuance, and judgment clearly ought to be given for the defendant. And it was ſtrongly urged, that the laſt clauſe in the deviſe to *Henry*, where it is deviſed "to him and his heirs, and "for lack of heirs of his body to remain to *Francis* and the heir of "his body," extends to all the clauſes before, and makes him to have an eſtate tail in all the lands deviſed to him. And one ſpecial reaſon offered was, becauſe he deviſed to *Thomas* and *Francis*, his eldeſt and ſecond ſons, eſtates of inheritance; ſo he intended to give as great an eſtate to his youngeſt ſon; for by intendment his affection is equal: alſo, the word "*Item*" couples them together, that he ſhould have as great eſtate in quality as the others. And againſt this point ALL THE FOUR JUSTICES argued and agreed, that *Henry* had but an eſtate for life in the land in queſtion; and that the laſt clauſe, "and for lack of heirs of his body," ſhall extend only to the lands in that clauſe, *viz.* to the bargains and grants; and it is found, that it was not any part of the bargains and grants. They all agreed, that the words in a will which diſinherit the heir at the common law ought to have an apparent intent, and not to be ambiguous and doubtful; and that the intent ought to be collected out of the words of the will, and not from any foreign intendment or averment: (*a*) and therefore when he gave to *Thomas* in tail, and in the ſecond to *Francis* in tail, and in the third to *Henry* in fee, and in the fourth to *Henry* only, not mentioning any eſtate, the law ſhall conſtrue it that he ſhall have it but for life; and that he did not intend a greater eſtate: and for the word "alſo," it is no more than the word "and," and ſhall not extend to the quantity of the eſtate, but to the clauſe following, "that he deviſeth, &c.:" and for that the Books were relied upon, 5. *Co.* 16. *Wild's Caſe*, and *Collier's Caſe* there. *Vide* 22. *Edw.* 3. 16. 7. *Edw.* 6. *Deviſe*, 38. 28. *Hen.* 8. *Dyer*, 1. 34. *Edw.* 3. *Avowry*, 158. 9. *Co.* 127. *Sunday's Caſe*. Wherefore for this point they all agreed, that it was but an eſtate for life, and concluded with the judgment in the common pleas.

In conſtruing a *will*, the intention of the teſtator ſhall be collected from *the words* he has uſed; and to diſinherit the heir, the intention of the teſtator muſt be clear and apparent. Poſt. 450. Vaugh. 262. Gilbert's Dev. 76. 1. Saund. 185. 6. Co. 17. a. Freem. 85. 3. Bulſt. 187. 3. Burr. 1578, 1620.

(*a*) See Doe on the demiſe of Gaſkin v. Gaſkin, Cowp. 661.

SECONDLY, Whether this *warranty* (*b*) be a bar during the life of the wife? It was objected, that it was a warranty which commenced by *diſſeiſin*, ſo as it cannot bar; for when *Henry* entered the keeping of *A.* and the uſe of the premiſes during her natural life; *Qu.* If *B.* has only or takes an *eſtate for life*? Ante, 304.

On a deviſe to *A.* in tail, and that *B.* his mother ſhall have the *guardianſhip*,

(*b*) By 4. Ann. c. 16. ſ. 21. all *warranties* made by any tenant for life of any lands, tenements, or hereditaments, the ſame deſcending or coming to any perſon in reverſion or remainder, ſhall be void and of none effect: AND LIKEWISE all *collateral warranties* of any lands, tenements, or hereditaments, by any anceſtor who has no eſtate of inheritance in poſſeſſion in the ſame, ſhall be void againſt his heir.

in

Spry against Berke.

in the life of *Margaret*, it was a *diſſeiſin* to her, and by conſequence to him in reverſion. But in this point ALL THE JUSTICES agreed, that it was no warranty which began by *diſſeiſin*: for, firſt, it is doubtful, Whether the wife had an eſtate for life, or only the guardianſhip? And BERKLEY held, that ſhe was only guardian; but the others againſt him, becauſe the limitation is, ſhe ſhall have it during her life: but although ſhe hath title by that deviſe to have an eſtate for life, yet it is not found that ſhe ever was ſeiſed thereof; and therefore it cannot be a *diſſeiſin* to her: alſo, it is no warranty beginning by *diſſeiſin*, becauſe *Henry* occupied from the death of *Thomas Cann* his grandfather, and entered in 1576; and it is not found that he made any *diſſeiſin*, nor had any ſuch intention at the time of the entry by himſelf.

9. Co. 59. a. Comp. 764.

A deviſe is made to *A.* and his heirs for ever, and for lack of heirs of his body, to *B.* in fee. *A.* and his wife make a feoffment to the uſe of themſelves in ſpecial tail, and after to the uſe of the heirs of *Henry*, with warranty to the feoffees and their heirs againſt all perſons. *A.* died without iſſue. *Qu.* If this warranty deſcends, and ſhall bind during the life of the wife?

Hob. 27. Jones, 200. 3. Mod. 192.

THIRDLY, Then the queſtion is, If it be a good warranty and deſcends, whether it ſhall bind during the life of the wife? And as to that point RICHARDSON and BERKLEY held, that it was a good warranty and ſhould bind; but JONES and MYSELF argued againſt it: *Firſt*, Becauſe the warranty never attached in the feoffees, and *ceſty que uſe* cometh in *in the poſt*, and before the warranty attached: and therefore JONES denied the reſolution mentioned in *Lincoln College Caſe* (*a*), and ſaid, there was not any ſuch reſolution; and relied upon the caſes 22. *Aſſ.* 37. and 29. *Aſſ.* 34. that he that comes to land in *the poſt*, as lord of a villain or lord by eſcheat, who enter before the warranty attached by deſcent, ſhall never have advantage of the warranty, which was not attached at the time of his entry: and upon that reaſon is *Chudley's Caſe* (*b*); he who hath an eſtate executed by uſe, by the ſtatute of 27. *Hen.* 8. c. . ſhall not have advantage of a warranty by *voucher*, nor otherwiſe. *The Second Reaſon*, Becauſe that the warranty *eodem inſtante* it was created is deſtroyed; for inſtantly the land returned to the feoffor, and is extinct *quoad* the reverſion clearly, becauſe the reverſion is reveſted in him in a fee as high as he gave it: and it is alſo determined *quoad* the huſband himſelf for the preſent eſtate; for the warranty hath no eſſence, or being in him to have benefit by *voucher* or *rebutter*; therefore it ſhall have no eſſence *quoad* the wife. And although it ſhould be held that *Lincoln College Caſe* ſhould be law, yet this differs from that caſe; for there he who recovered againſt tenant in tail, obtained a leaſe with warranty from an anceſtor collateral, and made a feoffment to uſes; and there the warranty was created, and did extend to the eſtate before the feoffment: but here the warranty begins with the feoffment to uſes; and the feoffee himſelf may never have benefit thereof by *voucher* or *rebutter*, and inſtantly with the creation is deſtroyed; and therefore compared it to the caſe in the Year-Books 40. *Edw.* 3. *pl.* 14. 11. *Hen.* 4. *pl.* 41. 20. *Hen.* 6. *pl.* 29. where one makes a feoffment with warranty, and afterward takes again by feoffment, the warranty is determined, becauſe he hath as great an eſtate as he gave.—But RICHARDSON and BERKLEY argued, although the warranty is determined for the inheritance, and ſhall not bind the huſband for the preſent eſtate, yet it is good, and ſhall be continued for the wife; and therefore *quoad*

(*a*) 5. Co. 62, 63. (*b*) 1. Co. 123. a.

her

her eſtate, ſhall be ſaid to have continuance; and in proof thereof theſe caſes were urged, 17. *Edw.* 3. *pl.* 47. 39. *Edw.* 3. *pl.* 9. 31. *Edw.* 3. "*Voucher*," 25. where the huſband made a feoffment with warranty againſt all perſons, and takes back an eſtate to him and his wife, and to a ſtranger, and to the right heirs of the huſband, the warranty is determined *quoad* the fee ſimple, but it is *in eſſe* as to the eſtate of the wife and *quoad* the ſtranger. But to theſe caſes it was anſwered, that they are not like to the caſe in queſtion, becauſe there the warranty was well created, and veſted in the feoffee, and is annexed to his eſtate, and he was entitled to the benefit of it by *voucher* or *rebutter*; and when he took back the eſtate, it veſted in him as aſſignee in *the per*, and not in *the poſt*; which is the reaſon of the caſe 31. *Edw.* 3. where a fine was levied with warranty to the conuſee, his heirs, and aſſigns, who renders by the ſame fine to the conuſor and his wife, that ſhe ſhall have benefit by this warranty by *voucher*, although it returns *eodem inſtanti*; for the eſtate is given by the render, and ſhe is in *in the per*; but ſo it is not here. And although it was alledged, that every one coming in of any eſtate may rebut by the warranty attached upon the land; yet as this caſe is, becauſe he comes in *the poſt*, before the warranty attached, he ſhall not have benefit thereof; and therefore JONES cited a caſe 7. *Eliz.* in the common pleas, where one made a feoffment with warranty to the uſe of himſelf for life, remainder for life, remainder to his right heirs, that it was reſolved this warranty ſhould not bind for the remainder to have benefit thereof. *The Third Reaſon* was made by JONES and MYSELF, that a feoffment with warranty being by tenant for life, to bar the reverſion, is not favoured in law: and when it is for the uſe of himſelf and his wife, and to the uſe of his right heirs, the warranty is deſtroyed *quoad* him who created it, and never by any means may bind him in his life: and when the anceſtor is not bound thereby, his heirs may not be bound; as *Litt. ſect.* 734. Uncle of tenant in tail, being infeoffed, makes a deviſe with warranty, which deſcends upon the iſſue in tail, it ſhall not bind, becauſe it is a maxim, that "the heir is not bound where the anceſtor is not bound himſelf;" and to that purpoſe was cited 31. *Edw.* 3. "*Grants*," 85. A father binds his heirs where he doth not bind himſelf, it is void to bind the heir, *Co. Litt.* 386. *a.* Wherefore for this point, the Court being divided, *adjournatur*.

SPIRT *againſt* BENCE.

Co. Lit. 390. a.

3. Co. 63. a.

Poſt. 396.

Sir Henry Ferrers's Caſe.

CASE 6.

SIR HENRY FERRERS, *Baronet*, was indicted by the name of SIR HENRY FERRERS, *Knight*, for the murder of one *Stone*, whom one *Nightingale* feloniouſly murdered, and that the ſaid *Sir Henry* was preſent, aiding and abetting, &c.

The addition of *Knight* inſtead of *Baronet* to the name of a defendant is fatal to an indictment, and may be pleaded in abatement

Sir Henry Ferrers, being arraigned upon this indictment, ſaid, that he was never knighted; which being confeſſed, the indictment was held not to be ſufficient: wherefore he was indicted *de novo*, by the name of SIR HENRY FERRERS, *Baronet*; and, being arraigned, pleaded *not guilty*, and was tried at the bar.

Ante, 102.

Jones, 346.

Cro. Jac. 482. 1. Vent. 154. 6. Mod. 105. 10. Mod. 284. Ld. Ray. 303. 509. 1014. Stra. 316. 850. 2. Hawk. P. C. 328. Co. Lit. 16. b. note (8).

Upon

If an officer be killed in attempting to arreſt *A. B* baronet, under a warrant againſt *A. B. knight*, it is manſlaughter only.

1. Jones, 346. 9. Co. 68. a. 1. Cro. Jac. 280. 1. Lev. 91. Foſter, 313. Ld. Ray. 1296. 1. Hale, P. C. 457. 460. 1. Hawk. P. C. 130. Caſes in Crown Law, 2d Edit. 106. 188.

Upon the evidence it appeared, that he was arreſted for debt, and that *Nightingale* his ſervant, in ſeeking to reſcue him, as was pretended, killed the ſaid *Stone*.—But becauſe the warrant to arreſt him was by the name of HENRY FERRERS, *Knight*, and he never was a knight, it was held by ALL THE COURT, that it was a variance in an eſſential part of the name, and they had no authority by that warrant to arreſt SIR HENRY FERRERS, *Baronet*; ſo it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder, becauſe no good warrant.

But upon the evidence it appeared clearly, that *Sir Henry Ferrers* upon the arreſt obeyed, and was put into an houſe before the fighting betwixt the officer and his ſervant; wherefore he was found "*not guilty*" of the murder and manſlaughter.

CASE 7.

Dorcheſter *againſt* Webb.

Michaelmas Term, 9. Car. 1. Roll 373.

If the obligee of a joint and ſeveral bond make the executor of one of the obligors his executor, this does not releaſe the other obligor; and ſuch executor, if he have no aſſets of the deceaſed obligee in his hands, may maintain an action of debt on the bond againſt the ſurviving obligors.

Poſt. 551.

DEBT, by *Anne Dorcheſter*, executrix of *Anne Rowe*, upon an obligation of 260l. by *William Webb*.

The defendant pleaded, that *John Dorcheſter*, late huſband to *Anne*, and the ſaid *William Webb* were obliged in this bond, jointly and ſeverally, to the ſaid *Anne Rowe*; and that the ſaid *John Dorcheſter* died, and made the ſaid *Anne* his wife, the now plaintiff, and the ſaid *Anne Rowe* the obligee, his executrixes; and that the ſaid *Anne Rowe* renounced, and the ſaid *Anne Dorcheſter* adminiſtered, and that *aſſets* to pay the ſaid debt came to the plaintiff; *et hoc, &c.*

The plaintiff confeſſeth the will of *John Dorcheſter*, and that the ſaid *Anne Rowe* renounced, and that the ſaid *Anne Dorcheſter* fully adminiſtered all the goods of *John Dorcheſter*; and after the ſaid *Anne Powe* made the plaintiff her executrix; and that neither at the death of the ſaid *Anne Rowe*, *nec unquam poſtea*, any goods of the ſaid *John Dorcheſter* came to the hands of the plaintiff.

The defendant upon this demurred.

8. C. Jones, 345. 8. C. Hutt. 128. 1. Roll. Ab. 929. 934. Moor. 855. Cro. Eliz. 114. 150. 161. Hob. 10. Co. Lit. 264. 364. b. Plowd. 186. 1 Sid. 97. 448. Yelv. 160. 1. Salk 306, 306. Carth. 513. 1. Leon. 320. 2. Lev. 73. Caſes Temp. Talb. 244. 2. Stra. 865. 3. Term Rep 557.

SIR JOHN BANKS and GRIMSTON argued *for the defendant*, and CALTHROP and SERJEANT WARD *for the plaintiff*. And the defendant much inſiſted, that when the obligee makes the obligor his executor, it is a releaſe in law of the debt; and ſo it is when he makes one of the obligors his executor; for a releaſe to one is a releaſe to both; and by the ſame reaſon, when the obligee makes the executor of one of the obligors, who is chargeable to that debt, his executor, it is a releaſe in law of that debt, for he may not ſue himſelf nor his companion: and although it be pleaded, that he fully adminiſtered the goods of *John Dorcheſter*, yet that is not material, nor alters the caſe, for ſhe remains always the executrix of *John Dorcheſter*, and may have the goods of the ſaid *John Dorcheſter*; and for that purpoſe cited *Mary Shipley's Caſe*, 8. *Co.* 134. that if an executrix pleads *plene adminiſtravit*, the plaintiff may take judgment preſently, and expect when ſhe hath *aſſets*.

Fitzg. 126. 2. Bac. Ab. 384. 3. Bac. Ab. 699. Ld. Raym. 605. 2. Saund. 218.

But

But JONES, BERKLEY, and MYSELF (RICHARDSON being absent), agreed, that the defendant hath no cauſe of demurrer, but that judgment ſhall be given for the plaintiff. FIRST, we agreed, that when the debtee makes the debtor his executor, it is not abſolutely a diſcharge of the debt, for the debt remains as *aſſets* in the hands of the debtor executor, and is *quaſi* a releaſe in law, becauſe he cannot be ſued; but it is a mere ſuſpenſion of the action where a *feme debtee* takes the *debtor* to huſband; or if a man debtee takes the debtor to wife, that is a releaſe in law, becauſe they may not be ſued, and perſonal actions once ſuſpended are perpetually ſuſpended; but where the *executor* of the *debtor* is made executor to the *debtee*, he hath nothing thereby in his own right, but is only to uſe an action in the right of another: and although ſhe be executrix to *John Dorcheſter*, yet when ſhe hath fully adminiſtered all the eſtate of the ſaid *John Dorcheſter* before ſhe be made executrix to *Anne Rowe*; ſhe hath in a manner diſcharged herſelf of being executrix to *John Dorcheſter*, and hath not any thing of his eſtate.

DORCHESTER *againſt* WEBB.

Carth. 513.

Sed vide 33. *Hen.* 6. pl. 24. 34 *Hen.* 6. pl. 24. 1. Roll. Ab. 929. (B) 2. 2. Saund. 226.

And they denied the law to be as it is cited in *Shepley's Caſe* (*a*), that if an executor pleads *plene adminiſtravit*, the plaintiff may pray judgment againſt him when *aſſets* come to him, but the plaintiff is to be barred if he acknowledge it; and if he deny that he hath not fully adminiſtered, which is found againſt him, he ſhall be barred alſo, and pay coſts to the defendant. The difference is, when it is found, that the defendant hath ſome *aſſets*, although of little value, ſo as he hath not fully adminiſtered, the plaintiff ſhall have judgment for the intire debt, but he ſhall not have execution but of as much as is found, and ſhall not be barred for the reſidue; and if more *aſſets* come afterwards, he may have a *ſcire facias* to have execution thereof: but if it be found, that he hath fully adminiſtered, or if it be ſo pleaded and confeſſed, the judgment ſhall be againſt the plaintiff; and ſo are all the precedents: wherefore here, ſhe having fully adminiſtered all the goods of *John Dorcheſter*, and not being chargeable to that debt as executrix to *John Dorcheſter*, ſhe as executrix of the ſaid *Anne Rowe* may maintain this action againſt the ſaid *Webb* the other obligor. Wherefore it was adjudged for the plaintiff. *Vide* 8. *Edw.* 4. *pl.* 3. 20. *Edw.* 4. *pl.* 17. 21. *Edw.* 4. *pl.* 81. 21. *Hen.* 7. *pl.* 31. 11. *Hen.* 4. *pl.* 83. 11. *Hen.* 7. *pl.* 4. 8. *Co.* 136. *Needham's Caſe*.

If an executor plead *plene adminiſtravit*, and it is found againſt him, the plaintiff ſhall have judgment for the entire debt; execution for *aſſets* found; and a *ſcire facias* for the reſidue.

Ante, 167. R. 404. 467. 468. 8. Co. 53. 1. Leon. 68. Moor, 246. 46. *Edw.* 3. 9. Cro. Eliz. 318. 592. 1. Roll Ab. 934. 2. Saund. 216. Hob. 199. 1. Sid. 448.

1. Ventris, 94. 1. Lev. 286. Salk. 312. 5. Com. Dig. 206. *Sed vide* 3. Bac. Ab. 33. *in notis*. 6 Term Rep. 685. 688.

(*a*) 8. Co. 134. Godolph. 193.

Sir William Waller's Caſe.

CASE 8.

SIR WILLIAM WALLER was indicted, For that he, in the palace of *Weſtminſter*, near THE GREAT HALL, the Juſtices in the king's bench, chancery, and common pleas, judicially ſitting to hear cauſes, made an aſſault and affray upon *Sir Thomas Reignolds*, and beat him, in diſturbance of the law and contempt to the king, &c. and upon this being arraigned, he was found guilty.

An aſſault and affray in the palace-yard near *Weſtminſter-Hall* when the Courts are ſitting, though out of their view, may be

puniſhed by indictment, fine, and impriſonment, but not the loſs of hand, by 33. *Hen.* 8. c. 12. [illegible]

SIR WILLIAM WALLER'S CASE.

Cro. Eliz. 405. W. Jones, 373. Owen, 120. 3. Inſt. 142. Moor, 819. 1. Hawk, P. C. 88. 4. Bl. Com, 125. 3. Term Rep. 739.

But becauſe the indictment was not, that he did it in the preſence of the Juſtices, nor in the preſence of the king, ALL THE JUDGES agreed, that the judgment of the cutting off his hand ſhould not be given; and ſo, *ſeriatim*, they delivered their opinions.

But becauſe this offence was in the palace near the halldoor, whereby tumults might have been made, and becauſe it was found to be done ſitting all the Courts, and in diſturbance of juſtice and the law, and in contempt to the king, THE COURT awarded, that he ſhould be impriſoned for the ſaid offence during the king's pleaſure, and ſhould pay one thouſand pounds fine, by the opinion of RICHARDSON, *Chief Juſtice*, JONES, and BERKLEY: and JONES and BERKLEY would have parcel of the judgment to have been, that he ſhould make his ſubmiſſion in all the courts of the king's bench, chancery, and common pleas, becauſe the offence was made to the ſaid courts.

But RICHARDSON, *Chief Juſtice*, and *I* did not agree thereto, becauſe there never was any ſuch judgment before; and for the fine, I conceived that five hundred pounds was ſufficient; and it was awarded, that he ſhould be bound with ſureties to his good behaviour. *Vide* 22. *Edw.* 3. *pl.* 13. 39. *Aſſ.* 1. 19. *Edw.* 3. "*Judgment*," 17. 41. *Edw.* 3. "*Corone*," 280. 42. *Aſſ.* 18. 41. *Aſſ.* 25. *Dyer*, 188. *Stanford*, *fol.* 38. *Trin.* 19, *Edw.* 3. *roll* 55. *Carus' Caſe*. 37. *Eliz.* Striking at the court of wards ſtairs, only impriſonment and fine, *Hil.* 17. *Eliz. roll* 6. *inter placita reg.* THOMAS JOANS indicted for murder, *apud* LE New Palace, *Weſtminſter*, 24. *January*, *ann.* 17. *Eliz. cognovit judicium*, *manus amputatur*; but it is not expreſſed *ſedente curiâ*.

Michaelmas

Michaelmas Term,

10. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

Memorandum.

CASE 1.

IN the vacation, *viz.* in *Auguſt* 1634, WILLIAM NOY, *Attorney General*, died at his houſe in *Brainford*, in the county of *Middleſex*.

The death of NOY, *Att. Gen.*

SIR EDWARD COKE (who was Attorney General to *Queen Elizabeth* and to *King James*, and afterwards Chief Juſtice of the common pleas, and then Chief Juſtice of the king's bench, and in 14. *Jac.* 1. diſcharged of that place), died at his houſe in *Stoke* in the county of *Bucks*, in *September* 1634, being a prudent, grave, and learned man in the common laws of this realm, and of a pious and virtuous life. He died in the eighty-ſecond year of his age.

The death of SIR EDWARD COKE.

In the ſame vacation, *viz.* 14. *September*, the king at *Hampton Court* diſcharged and removed SIR ROBERT HEATH from his place of Chief Juſtice of the common pleas.

SIR R. HEATH removed. Ante, 52. 65. Cro. Jac. 407.

Within two days after he appointed SIR JOHN FINCH, of *Gray's Inn*, who was of the king's learned counſel, and attorney to *Henrietta-Maria* the queen, to be Serjeant at law, and Chief Juſtice of the ſaid court; who the firſt day of this Term came unto the chancery bar, where, after a ſpeech made by *Lord Coventry*, keeper of the great ſeal, and his anſwer thereunto, was ſworn Serjeant at law; and upon *Monday* (being the day of eſſoigns of *Quindena Mich.*) appeared at the common pleas bar, clad and attired in his party-coloured robes and habiliments of a Serjeant at law, and counted upon a writ of right, *de præcipe in capite*, brought by the ſaid queen againſt *Henry Earl of Holland*, Chief Juſtice and Juſtice in Eyre of all the king's foreſts, chaſes, parks, and warrens *citra Trent*, and Steward of all the queen's courts, &c.

SIR JOHN FINCH created Serjeant, and made Chief Juſtice of the common pleas. Jones, 350.

The ſaid SIR JOHN FINCH gave rings, the inſcription of which was, "*Roſæ et lilia dant purpuram*," and kept his feaſt; and the next day, being *Thurſday* the 16. of *October*, was ſworn Chief Juſtice of the common pleas; and upon the *Saturday* following, arrayed in his Judge's robes, and accompanied by the *Earls of Dorſet, Holland, Newport*, and forty other of nobles, knights, and eſquires (the ſociety of *Gray's Inn*, and inns of chancery, and officers of the court attending him), was ſo brought into the ſaid court.

The Chief Juſtice gives rings with the motto "*Roſæ et lilia dant purpuram.*"

SIR ROBERT HEATH appeared at the common-pleas bar the firſt day of this Term, and, being in his place of junior Serjeant at law, pleaded for his clients as Serjeant at law; which was done by the king's ſpecial command upon his humble petition to his majeſty, who, by advice of the lords of his council, granted him leave to practiſe there, and in all other his courts at *Weſtminſter* excepting the ſtar-chamber only.

SIR R. HEATH returns, by the king's permiſſion, to the practice of the bar.

The appointments of *Banks* and *Littleton* to the offices of Attorney and Solicitor General, and *Sheldon* receives a patent of precedency.

And in this vacation SIR JOHN BANKS, Reader of *Gray's Inn*, and the Prince's Attorney, was ſworn Attorney General; and SIR RICHARD SHELDON, the King's Solicitor, reſigned up his place, having obtained a new patent to be one of the king's learned counſel, with the ſame fee he had before, *viz.* ſeventy pounds *per annum*, and with a privy ſeal to have precedency before the King's Solicitor. And EDWARD LITTLETON, of the *Inner Temple*, RECORDER of *London*, was made the King's Solicitor.

CASE 2.

Tylle *againſt* Peirce.

Eaſter Term, 10. *Car.* 1. *Roll* 306.

If a man agree, upon his marriage, that his wife ſhall diſpoſe of money by her will, a diſpoſal by writing in the nature of a will is good.
Ante, 220.
Poſt. 597.

DEBT upon an obligation of ſix hundred pounds, conditioned, Whereas the defendant was to eſpouſe *A. S.* a widow; if the marriage took effect, and he ſhould ſurvive the ſaid *A. S.* that if within three months after his deceaſe there were paid to the ſaid obligees three hundred pounds to and for ſuch uſes and purpoſes as the ſaid *A. S.* by any writing under her hand and ſeal ſubſcribed and publiſhed in the preſence of two witneſſes, ſhould nominate, declare, and appoint, then, &c.

The defendant pleaded, that ſhe did not limit, declare, or appoint any uſe or purpoſe for the employment of that money.

The plaintiff replies, that ſhe, by her will in writing, ſealed and publiſhed by her in the preſence of two witneſſes (naming their names), did thereby will and appoint ſuch ſums to be paid, and that the defendant had not paid them.

2. Danv 512. Cro. Eliz. 27. Moor, 339. 2. And. 92. 1. Roll. Ab. 608. 913. 1. Ventris, 280. Hob. 17. 312. 1. Mod. 211. 2. Mod. 172. 10. Mod. 225. 1. Vern. 408. 244. 2. Vern. 329. 2. Peere Wms. 82. Preced. Chan. 44. 84. 355. Sera. 891. 1111. 3. 8. 2. Com. 498. 2 Com. Dig. 156. 158. 4. Com. Dig. 413.

The defendant thereupon demurred.

ROLLE, *for the defendant*, now ſhewed the cauſe, For that ſhe ought to have made *a deed* in writing, and not *a will*: FIRST, Becauſe it was not to have any effect until after her death, and it was ambulatory and revocable, and a *feme covert* may not make any will.

But THE COURT (JONES being abſent) held, that this declaration was good; for although a *feme covert* may not make a will without her huſband's aſſent, yet that declaration in form of a will is good enough.

RICHARDSON, *Chief Juſtice*, thereupon cited a caſe to be adjudged in the common pleas when he was Chief Juſtice there, upon a conveyance, wherein was A PROVISO, that one might revoke the uſes by writing under his hand and ſeal, that a revocation by will under his hand and ſeal was adjudged a good revocation.

And although the pleading was here, that the ſaid *A. S.* "*voluit* "*et deviſavit*," and not that it was "*appointed*" by her, yet THE COURT held it to be well enough; for it is not properly a will, being made by a *feme covert*, but a writing in nature of a will. Wherefore rule was given, that judgment ſhould be entered for the plaintiff, unleſs other cauſe, &c.

CASE 3.

Holmes's Caſe.

The offence of *arſon* may be committed by wilfully ſetting fire to one's own houſe, provided the houſe of *another* be thereby *burned*; but if no miſchief be done to the houſe of another, it is not felony, though the fire was kindled with that intent.

WILLIAM HOLMES was indicted in *London*, For that he, in *April*, 7. *Car.* 1. being poſſeſſed of an houſe in *London*, in *Thregmorton ſtreet*, in ſuch a ward, for ſix years, remainder to *John S.* for three years, the reverſion to the corporation of *Haberdaſhers*, in

fee,

fee: he *vi et armis*, 3. *April*, 7. *Car.* 1. the said house "*felonicè* HOLMES'S CASE
"*voluntariè, et malitiosè, igne combussit, eâ intentione, ad eandem domum*
"*mansionalem, nec non diversas alias domos mansionales diversorum lige-*
"*orum domini regis; adtunc et idem situat. et existent. ad dictum domum*
"*mansionalem dicti* WILLIELMI HOLMES *contiguè adjacent. adtunc*
"*et ibidem felonicè, voluntariè, et malitiosè totaliter comburendo et igne*
"*consumendo contra pacem.*"

Upon his being arraigned at Newgate, he was found guilty; but before judgment this indictment was removed by *certiorari* into this court. It was argued at the bar by GRIMSTON, that it was not felony; and now this Term at the bench.

And, by RICHARDSON, *Chief Justice*, JONES, and BERKLEY, it was held, that it was not felony to burn a house whereof he is in possession by virtue of a lease for years; for they said, that burning of houses is not felony, unless that they are *ædes alienæ*: and therefore BRITTON (*a*), BRACTON (*b*), and THE BOOK ASSIZE (*c*) mention, that it is felony to burn the house of another; and 10. *Edw.* 4. *pl.* 14. 3. *Hen.* 7. *pl.* 10. 10. *Hen.* 7. *pl.* 1. and *Poulter's Case* (*d*), which say, that burning of houses generally is felony, are to be intended *de ædibus alienis, et non propriis*: and although the indictment be "*eâ intentione ad comburendum felonicè, vo-*
"*luntariè, et malitiosè,*" the houses of divers others "*contiguè ad-*
"*jacentes,*" yet intent only without fact is not felony. Also BERKLEY and JONES, *Justices*, held, that it cannot be said to be *vi et armis*, when it is in his own possession.

2. Inst. 188. 3. Inst. 66, 67. Sum. 85. Bro. Cor. 225. 1. Jones, 351. S. P. C. 36. 126. 4. Co. 20. 4. Bl. Com. 222. Foster, 116. 1. Hawk. P. C. 166. Cases in Crown Law, 2d edit. 193. 195. 209.

JONES, *Justice*, also said, that he could not be well indicted of felony, because none of their names are mentioned who were the owners of the houses adjoining. But to that objection BERKLEY and RICHARDSON agreed not.

In *arson*, the name of the person whose house is burnt must be stated. Cases in Crown Law, 2d edit. 209.

But *I* argued, that the burning in the indictment mentioned is felony, because it is *capitale crimen, felleo animo perpetratum*, which is the definition of felony in *Co. Lit.* 391. a. Also by the rule in BRACTON, 146. "*quod incendium nequiter, et ob inimicitias, factum*
"*capitali pœnâ puniatur; si verò sit incendium fortuitò vel per negligen-*
"*tiam, et non malâ conscientiâ, non sic punietur; sed versus eum crimi-*
"*naliter agatur.*" And it cannot be said to be by negligence in another's house; wherefore it is to be intended in his own house. Also this burning is found to be *malitiosè*; so it is *malâ conscientiâ et nequiter factum.* Also this burning of his house in a street of the city adjoining to the houses of others, is to the endangering of the city, and therefore ought to be construed to be felony; but so peradventure is not the burning of his house in the fields. And whereas it was said, that the intention cannot make a felony, it was answered, that the intention here is coupled with an act of burning, and with the intendment of an act which is felony; as 5. *Hen.* 7. *pl.* 18. 7. *Hen.* 7. *pl.* 42. 13. *Edw.* 4. *pl.* 9. where a man delivers goods to one, and afterwards he that delivered them privately steals them, to the intent to charge him, it is felony. And whereas it was objected, that being his own possession, it cannot be said *vi et armis*; I answered, that *vi et armis* is well enough, where there is a malfeasance, as it is in an action upon

The wilfully setting fire to a man's own house *in a town* is a high misdemeanour, and punishable by fine, imprisonment, pillory, and perpetual sureties for good behaviour.

1. Hale P. C. 568. 1. Hawk. P. C. 166. 4. Bl. Com. 221. Foster, 116.

(*a*) p. 16. (*b*) p. 146. (*c*) 27. Assise, pl. 44. (*d*) 11. Co. 29.

HOLMES'S CASE.

the caſe, 9. *Co.* 50. b. Alſo every indictment is *vi et armis et contra pacem*, where an act is done againſt the commonwealth: ſo it is where a ſervant runs away with goods committed to his truſt above forty ſhillings, although properly it cannot be ſaid to be *vi et armis*, becauſe they were in his cuſtody. And in this caſe the ill conſequence which might have fallen out by this act makes the offence the greater; and THE YEAR-BOOKS in 10. *Edw.* 4. *pl.* 14. 3. *Hen.* 7. *pl.* 10. 11. *Hen.* 7. *pl.* 1. and *Stanford*, 36. 11. *Co.* 29. 4. *Co.* 20. a. put the caſe of burning of houſes generally, and not of the burning of other men's houſes: and it is an equal miſchief in a commonwealth to burn his own in a city or vill as to burn the houſes of others, for the danger which may enſue.

Ante, 325. Poph. 206. 2. Hawk. P. C. 343, 344.

4 Bl. Com. 221.

But THE OTHER THREE JUSTICES reſolved *ut ſupra*, that it was not felony; wherefore he was diſcharged thereof.

On a ſpecial verdict for *aſſon*, if it be found no *felony*, yet the party may be fined for the *treſpaſs*. *Sed vide* Cro. Jac. 497. Kely, 29. and 2. being tried for for treſpaſs.

But becauſe it was an exorbitant offence, and found, they ordered, that he ſhould be fined 500l. to the king, and impriſoned during the king's pleaſure, and ſhould ſtand upon the pillory, with a paper upon his head ſignifying the offence, at *Weſtminſter* and at *Cheapſide*, upon the market-day, and in the place where he committed the offence, and ſhould be bound with good ſureties to his good behaviour during life.

Hale P. C. 172. where Lord Hale doubts the propriety of this point of the caſe, becauſe *felony*, the priſoner hath not thoſe advantages for his defence as if he were indicted only And ſee 2. Hawk. P. C. 625. 2. Stra. 1137. and Caſes in Crown Law, 2d edit. 15.

CASE 4.

Robodham *againſt* Venleck.

In ſlander, when the introductory matter is ſufficiently ſhewn, an *innuendo* may *explain* the doubtful words. Ante, 192.

ACTION FOR WORDS. Whereas the plaintiff exhibited in the king's bench articles of the good behaviour againſt the defendant, and made oath before JUSTICE WHITLOCK, one of the Juſtices of the ſaid court, of the truth of them, that the defendant ſpake theſe words of the plaintiff: "He (*innuendo* the plaintiff) "made a falſe oath (*innuendo* the oath aforeſaid) before the Judge, "*innuendo* the ſaid Juſtice); and I have that in my houſe that can "prove it:"

After not guilty, and found for the plaintiff, it was moved by BALL, that for theſe words an action lies not; becauſe he doth not ſhew there was any ſpeech of the plaintiff *before*, nor *of* that oath: alſo he doth not ſhew it to be a falſe oath taken in any court.

Ante, 177. 1. Roll. Ab 39. Ld. Ray. 260. Cowp. 276. 1. Term Rep. 70.

But (*abſente* RICHARDSON) JONES, BERKLEY, and MYSELF held, that the action well lies; for when it is alledged to be ſpoken *falſely of the plaintiff*, that is ſufficient, without ſhewing there was any ſpeech *of* him. And when it was ſhewed that articles for the good behaviour were exhibited in the king's bench, and he ſworn to the truth of them before JUSTICE WHITLOCK, and he affirmed that this oath is falſe, this is a ſcandalous ſpeech, and charges him with perjury: for it is an oath taken in a court of record: and it is not like to the caſe alledged, that "thou wert forſworn in "*Whitechurch court* (*a*);" for this Court hath no cognizance that *Whitechurch* is a court of record. And here, when the defendant hath pleaded not guilty, and is found guilty, that aſcertains the Court he ſpake thoſe words of the plaintiff, and concerning that oath. Wherefore it was adjudged for the plaintiff.

(*a*) Skinner *v.* Trobe, Cro. Jac. 190.

Merrick

Merrick *againſt* The Hundred of Rapeſgate, in the County of Glouceſter.

CASE 5.

Eaſter Term, 10. *Car.* 1. *Roll* 231.

ERROR of a judgment in the common pleas, For that the plaintiff had brought his action againſt the hundred upon the ſtatute of *Winton*, 13. *Edw.* 2. ſt. 2. c. 1. of HUE AND CRY, and the ſtatute of 27. *Eliz.* c. 18.: and counts, that he was robbed in *S.* in a certain place called the Highway, leading from *L.* unto *Glouceſter*, of ſuch a ſum by perſons unknown; and that he made HUE AND CRY at *Cotesford*, in the ſaid county, near to the ſaid place where he was robbed, and gave notice of the ſaid robbery to the inhabitants of *Cotesford* aforeſaid: and that he was ſworn accordingly before ſuch a juſtice of the peace that he was robbed of ſuch a ſum, and did not know any of the parties.

The *notice* required by the ſtatutes of HUE AND CRY is not confined to *the hundred* or *the county* in which the robbery was committed. Ante, 41. Show. 94.

Upon not guilty pleaded, and found for the plaintiff in the common pleas, and judgment there, error was brought and aſſigned by

SIR JOHN BANKS, *Attorney General*, Becauſe he doth not alledge that *Cotesford* was a vill within the hundred, ſo as notice was given to the inhabitants within the hundred where the robbery was committed: for to give it to any of the vills of another hundred, is not within the intention of the ſtatute; for they will not regard it, becauſe they ſhall not be charged with the loſs.

But ALL THE JUSTICES held, that it is not material it ſhould be given to thoſe of the hundred, but to the inhabitants of the vill near adjoining to the place where the robbery was committed; for the words of the ſtatute do not mention, that notice ſhall be given to the inhabitants of the hundred.

HENDEN, *Serjeant*, ſaid, it hath been adjudged, that HUE AND CRY made, and notice given to the inhabitants of the villages near adjoining to the place where the robbery was done, although it be out of the hundred and county, was good enough.

But ALL THE JUSTICES doubted thereof, if out of the county: but although it were in a place in another hundred it were well enough; for by intendment the party robbed cannot know the diviſion of the hundreds; but he ought at his peril to make it in a village near adjoining to the place where he was robbed. Whereupon the judgment was affirmed. Ante, 41.

CRAWLEY, *Juſtice*, ſaid, that in the common pleas, in an action againſt the hundred of *Daccorn* (*a*), upon a ſpecial verdict, it was adjudged, that HUE AND CRY made in the next vill adjoining, although it were in another county, was adjudged good.

(*a*) Tutter *v.* Dacorum, ante, 41. See 8. Geo. 2. c. 16. Dougl. 465.

Stevens *againſt* Faucon.

CASE 6.

Hilary Term, 9. *Car.* 1. *Roll* 1052.

ERROR of a judgment in the common pleas in *quare impedit*. *Faucon* had brought a *quare impedit* againſt GEORGE late *Archbiſhop of Canterbury* and the ſaid *Stevens* for the church of *Newington*, in the county of *Surry*, where the plaintiff entitled himſelf by grant of

In *quare impedit*, if the plaintiff entitle himſelf to the next avoidance, and alledge that the former incumbent was preſented, admitted, inſtituted, and *inducted*, and the defendant do not traverſe the *induction*, A REPLEADER ſhall be awarded. Cowp. 510. Dougl. 396. 747.

STEVENS. *against* FAUCON.

the next avoidance; and that one *Tobias Crisp* was presented, admitted, instituted, and inducted thereto, and that the said church became void, by the acceptance of a second benefice above value. The archbishop pleaded a plea thereunto; whereupon it was demurred. *Stevens* pleaded a plea, and traverseth, that the said *Tobias Crisp* was admitted and instituted therein; and upon this they were at issue, and a writ awarded to the archbishop for that trial: but afterwards, upon consideration of the said plea of *Stevens*, it was adjudged an ill plea, and *repleader* was awarded; because the induction, being alledged, ought also to have been traversed.

In *quare impedit*, if the ordinary die after verdict, and before the day in bank, the proceeding shall stay as against *him*.

The defendant therefore amended his plea, and traversed the admission, institution, and induction; and issue was joined thereupon, and tried for the plaintiff. And after divers continuances and days *in banco*, the plaintiff shewed, that the archbishop was dead since the last continuance, and prayed that there might be no further proceedings as against him, and to have judgment against the defendant *Stevens* upon the verdict; which was granted him.

And now error brought.

A *repleader* shall be awarded where the mispleading alters the mode of trial. Plow. 529. Cowp. 510.

THE FIRST ERROR assigned was, That the repleading was not well awarded; for the issue which was joined before the writ awarded to the archbishop was well enough, and needed not any repleader.—But ALL THE COURT here held, that the repleader was well awarded: for the induction being alledged as well as the institution, there ought to be a traverse to it; which alters the course of the trial, as 22. *Hen.* 6. 27. and 2. *Hen.* 4. 17. are; so as it shall be tried *per pais*.

If *quare impedit*, on a surmise that the bishop died after last continuance, judgment may be entered against the other defendant only. Ante, 336.

THE SECOND ERROR assigned was, That where the allegation was that the archbishop was dead, and the judgment *ideo consideratum fuit* that he should recover only against the said *Stevens*, &c. it was not good, because it is not entered, *Et quia "le dit* STEVENS," *hoc non dicit, ideo consideratum est*, &c.; for until the other party confess or deny it, upon a surmise only of the part of the plaintiff, without the defendant's joining, the Court ought not to give judgment: wherefore for this cause it is erroneous.—But ALL THE COURT held, that it was well enough; for the archbishop being surmised to be dead, and the other defendant, by trial of the issue against him, being out of court, either to count, plead, or confess it, the Court shall adjudge thereupon according to the surmise of the plaintiff, and shall proceed to judgment against the defendant only. Wherefore the judgment was affirmed.

CASE 7.

Anonymous.

An indictment that *A.* and 27 others engrossed, without saying *quilibet eorum*, is good.

INDICTMENT against *J. S.* and twenty-seven others, of *Chesswick*, for that they engrossed *magnum quantitatem straminis et fœni apud Chesswick*, with an intent to sell it and make it the dearer.

It was moved by *Robert Hide*, that this indictment was not sufficient, Because he doth not say that *quilibet eorum* ingrossed; for

2. Lev. 208. 2. Burr. 832. 3. Com. Dig. 642. 2. Hawk. P. C. 336. 342.

twenty-

twenty-eight may not ingroſs together.—*Sed non allocatur*: for it may be that twenty-eight may ingroſs and ſell together; though it be not probable. ANONYMOUS.

THE SECOND EXCEPTION was, Becauſe it is ſaid, that they engroſſed 13th *January*, 9. *Car.* 1. and 20. *May*, 10. *Car.* 1. at *Cheſwick*, "*magnam quantitatem ſtraminis et fœni*;" which is altogether uncertain, not mentioning how many loads of hay and how many of ſtraw they engroſſed.—And for that cauſe the indictment was quaſhed. An indictment for engroſſing *magnam quantitatem ſtraminis et fœni*, is bad for uncertainty.

5. Co. 121. 1. Roll. Rep. 137. Show. 389. Stra. 497. 849. 900. 1246. 2. Salk. 4. Co. 41. 342. 371. 687. 3. Com. Dig. 505. 2. Hawk. c. 25. ſ. 74. Cowp. 682.

Stile *againſt* Finch.

CASE 8.

ACTION FOR WORDS; and declares, they were ſpoken 2. *Car.* 1. The defendant pleaded not guilty; and it was found againſt him. The ſtatute of limitation muſt be pleaded, and cannot be taken advantage of on motion. Ante, 115. 169. 163. 294. Poſt. 404.

ADAM *moved* in arreſt of judgment, that the action is brought for words ſpoken *ſix years* before the action commenced; ſo that by the ſtatute of limitations he was barred of this action; and therefore the Court ought not to give judgment upon this verdict for the plaintiff.

1. Roll. Ab. 47. 1. Lev. 110. Ld. Raym. 838. Carth. 137. Strange, 836. 1. Com. Dig. 154. 1. Wilſ. 154. 2. Wilſ. 145. Dougl. 656.

JONES and BERKLEY held, that the plaintiff ought to have judgment, becauſe the defendant hath not *pleaded* the ſtatute: for there may be divers cauſes, that he could not bring the action before this time, *viz.* that he was in priſon, or within age, or beyond ſeas, or that he had ſued the defendant to outlawry, and the defendant had reverſed the outlawry, and this action brought within a year after the reverſing of the outlawry (as in truth the caſe was); for then the action is well brought.

But ADAM moved, that he ſhould have then ſhewn it in his declaration.—But it was adjudged for the plaintiff.

Stonehouſe *againſt* Corbett.

CASE 9.

ERROR of a judgment in waſte in the common pleas. The error aſſigned was, That divers waſtes being alledged, to ſome of them the defendant pleaded "*nul waſt fait*;" to others, he pleaded "*juſtifiable waſte*;" to a third, he pleaded a plea *in excuſe* of the waſte. Upon theſe pleas iſſues were joined, and a *venire facias* awarded, reciting the iſſues, and commanding a jury to be returned to enquire if the defendant did commit the waſte, as the plaintiff hath declared. In waſte, if iſſues be joined upon ſeveral pleas, and the *ven. fac.* reciting the iſſues, command an enquiry, "as the "plaintiff al-"ledges," this implies that the enquiry ſhall be of the ſeveral iſſues.

And for this cauſe ROLLE aſſigned it for error, Becauſe they ought to have enquired of the ſeveral iſſues as they be joined.

But becauſe that divers *venire facias*' were in this manner; and the enquiry, "if waſte be made as the plaintiff hath declared," implies, that they ſhall enquire according to the ſeveral iſſues; "if the "waſte were in ſuch manner as the plaintiff hath declared," otherwiſe the verdict ſhould be againſt him, THE COURT held it to be good enough, and no error. Wherefore rule was given to affirm the judgment. Poſt. 400. 2. Roll. Ab. 816, 2. Cromp. Prac. 312.

Houell

CASE 10.

A deviſe to his wife for life, and after her deceaſe the lands to be ſold by his executors, is a *naked authority*, not coupled with any *intereſt*, and ſurvives on the death of *one* of them, but he cannot ſell till the death of the tenant for life. 1. Jones, 352. Kelw. 44. 2. Brownl. 194. 2. Leon. 220. 2. Bulſt. 125. Godb. 46. Perkins, ſ. 550. Hard. 419. Jones, 352. 1. And. 145. 2. And. 59. Moor, 62. Savil, 73. Cro. Eliz. 80. 26. 1. Com. Dig. 759.

Houell *againſt* Barnes.

UPON a ſuit in chancery, a caſe was agreed by the counſel of both parties and referred to JONES, BERKLEY, and MYSELF, *Juſtices*, to conſider and certify our opinions.

The caſe was, One *Francis Barnes*, ſeiſed of land in fee, deviſeth it to his wife for her life, and afterwards orders the ſame to be ſold by his executors hereunder named, and the monies thereof coming to be divided amongſt his nephews; and of the ſaid will made *William Clerk* and *Robert Cheſly* his executors. *William Clerk* dies; the wife is yet alive.

Two queſtions were made:

FIRST, Whether the ſaid *William Clerk* and *Robert Cheſly* had *an intereſt* by this deviſe, or but *an authority*?

SECONDLY, Whether the ſurviving executor hath any authority to ſell?

WE ALL RESOLVED, that they have not any intereſt by this deviſe, but only an authority, and that the ſurviving executor, notwithſtanding the death of his companion, may ſell; and ſo we certified our opinions. But whether he might ſell the reverſion immediately, or ought to ſtay until the death of the wife, was a doubt. *Vide* 30. *Hen.* 8. *Br.* "*Deviſe*," 31. 9. *Edw.* 3. *pl.* 16. *Co. Lit.* 112, 113. 136. 181. 8. *Aſſ.* 26. 2. Peere Will. 308. Pow. on Dev. 292. 306. Note (1) to Harg. Co. Lit. 113. a.

CASE 11.

It is actionable to ſay of a barriſter that "*he* "*is* A DUNCE, "*and will get* "*little by the* "*law.*" Poſt. 515. 1. Roll. Ab. 54, 55. Godb. 441. Co. Ent. 22. 2. Vent. 28. Cro. Jac. 267. 1. Com. Dig. 182. 1. Mod. 172. 1. Lev. 297. 1. Vent. 98. Ray. 196. 1. Sid. 327. 3. Wilſ 59. Stra. 1138. 4. Bac. Ab. 492. 503.

Peard *againſt* Jones.

ACTION FOR WORDS. Whereas the plaintiff was of the *Middle-Temple* for divers years, and called to THE BAR, and gave counſel to divers the king's ſubjects, and practiſed the law, and had married the daughter of *J. S.*; that the defendant, having communication with the ſaid *J. S.* concerning the plaintiff, and the marriage of his daughter, ſaid of the plaintiff, "*He is* A DUNCE, "*and will get little by the law.*" To which words the ſaid *J. S.* anſwering, that "*Others have a better opinion of him*," he replied, "*He* "*was never but accounted* A DUNCE *in the Middle-Temple.*"

The defendant pleaded not guilty; and it was found againſt him, and damages to one hundred marks.

BING, *Serjeant*, moved in arreſt of judgment, that theſe words are not actionable: for an action lies not for calling one "a dunce;" for DUNCE was a great learned man, and he was thereby compared to him, and then no diſcredit: and "dunce" is commonly ſpoken of one who is dull and heavy of wit, and though not ſo ready and nimble as others, yet he may be of a ſolid judgment; therefore they ſeem not words of diſcredit: and to ſay, "he will not get "much by the law," that may be, becauſe he will not give himſelf to practiſe.

BUT ALL THE COURT *ſeriatim* delivered their opinions, that the action well lies, for the words are to be intended according to the common ſpeech; and *dunce*, in common intendment and ſpeech, is taken for one of dull capacity and apprehenſion, and not fit for a lawyer. Words ſhall be taken in ſuch ſenſe as they are ſpoken;

and

and they are alledged to be ſpoken maliciouſly, and to the intent to ſlander him in his profeſſion; and ſo, upon not guilty pleaded, it is found, that he ſpake them maliciouſly. And for the words, that "*he will not get much by the law*," it is not to be intended that he hath no will to practiſe, and to gain by his profeſſion; but he will not gain, *viz.* he will not deſerve to gain, &c. Wherefore it was adjudged for the plaintiff.

PEARD *againſt* JONES.

Morgan's Caſe.

CASE 12.

MORGAN and two others were indicted for counterfeiting twenty-ſhilling pieces of the king's coin, and *Morgan* for offering thoſe pieces to the king's ſubjects, knowing them to be counterfeit. And being thereupon arraigned, he pleaded not guilty; and evidence being pregnant againſt *Morgan*, he was found guilty, and the others were acquitted: and judgment given, that he ſhould be drawn and hanged; but not to be quartered, according to the opinion of STAUNFORDE.

Judgment for uttering counterfeit ſhillings to be *drawn* and *hanged*, but not *quartered*.

Staunf. P. C. 182. a. 3. Inſt. 15. 17. Sum. 19. 268.

2. Lev. 98. 1. Hale, 187. 219. 352. 2. Hawk. P. C. 630.

Beale *againſt* Beale.

CASE 13.

DEBT upon an obligation conditioned for the performance of the arbitrament of *J. S. ſo as* the ſame be delivered upon the 28th of *February* following at the ſhop of *John Rolf*, ſcrivener, in *Cornhill*, &c. The defendant pleaded "*nul tiel arbitrement.*" The plaintiff ſhews an arbitrament 27th *February*, and what; and that he delivered it at the ſhop of *John Rolf*, ſcrivener, in *Cornhill*; and ſhews the breach. And upon this the defendant demurred.

On a ſubmiſſion ſo as the award be delivered on the 28th at the ſhop of *A.* a delivery on the 27th is good.

Hob. 49.

One cauſe aſſigned by GRIMSTON was, For that the arbitrament is ſaid to be delivered the 27th of *February*, and not the 28th of *February*; nor is it averred to be delivered at the *aforeſaid* ſhop, nor to the *aforeſaid John Rolf*: and it may be he hath removed his ſhop, and then it is not intended it ſhould be delivered at the new ſhop; or there may be another *John Rolf*—*Sed non allocantur*; for it ſhall not be intended another perſon nor another ſhop, unleſs the contrary had been ſhewn.

4. Leon. 49. 2. Saund. 298. 2. Lev. 3. 3. Lev. 413. Salk. 75. Kyd, 116.

SECONDLY, Becauſe the arbitrament was uncertain, *viz.* to pay the charges in ſuch a ſuit.—*Sed non allocatur*; for they are certain enough, when the attorney hath made a bill of charges. Wherefore it was adjudged for the plaintiff.

An award to pay *the charges* of an attorney's bill is good.

2. Ven. 242. Kyd, 135.

1. Roll. Ab. 251. 3. Lev. 18. 1. Sid. 12. 358. Carth. 156. *Sed vide* 3. Lev. 414.

Langden *againſt* Stokes.

CASE 14.

ASSUMPSIT. Whereas the defendant on the 2d *April*, 9. *Car.* 1. (for ſuch a valuable conſideration) aſſumed to go ſuch a voyage in ſuch a ſhip before the *Auguſt* following, and alledges a breach in the non-performance:

A promiſe may be diſcharged by him to whom it was made before it is broken; and if made by words, may be verbally diſcharged.

The defendant pleaded, that before any breach the plaintiff, on the fourth of *April* at ſuch a place, *exoneravit cum* of the ſaid promiſe. Hereupon the plaintiff demurred.

ROLLE, *for the plaintiff*, now alledged, that this pleading a diſcharge without ſhewing how, was not good; and he cited divers books,

1. Sid. 293. 177. 1. Mod. 206. 262.

1. Leon. 214. 3. Lev. 237. Cro. Jac. 483. 620. 2. Mod. 44. Ray. 42. Yelv. 22. 1. Jones, 179.

LANGDEN *against* STOKES,

books, 22. *Edw.* 4. *pl.* 40. that *indemnem conſervet*, or *exonerabit*, is no plea.

1. Bac. Ab. 179. 2. Term Rep. 26.

MAYNARD, *for the defendant*, argued to the contrary, that forasmuch as this was an action grounded on a promiſe by *words*, it may be diſcharged by *words*, before the breach thereof; and therefore *exoneravit* generally is a good plea: and he cited for this THE YEAR-BOOK 3. *Hen.* 6. *pl.* 36.

ALL THE COURT was of this opinion (*abſente* BERKLEY).—RICHARDSON, *Chief Juſtice*, ſaid, that he knew it had been ſo reſolved divers times; and the rule was remembered, "*Eodem modo* "*quo oritur, eodem modo diſſolvitur.*" Wherefore it was adjudged for the defendant, *quòd querens nihil capiat per billam.*

CASE 15.

King *againſt* Coke.

Eaſter Term, 10. *Car.* 1. *Roll* .

To a plea of *liberum tenementum* a replication ſhewing a leaſe for years, the date of which is antecedent to the defendant's title, need not *traverſe* that the place *ubere* is the *freehold* of the defendant.

S. C. Jones, 352. Dyer, 171. Cro. Jac. 594.

TRESPASS. *Quare clauſum fregit pedibus ambulando et averiis depaſc. &c.* The defendant juſtifies, Becauſe the place WHERE, at the time WHEN, *fuit ſolum et liberum tenementum of John Marquis of Wincheſter*, and ſo juſtifies by his command. The plaintiff replies, that this land is parcel of the manor of *Abbotts-Anns*; and that *William Marquis of Wincheſter* was ſeiſed in fee of the ſaid manor, and levied a *fine* thereof to the uſe of himſelf and *Lucy* his wife for their lives, the remainder to *Lord Edward Pawlet* for an hundred years, if he lived ſo long. *William Lord Marquis* died, and *Lucy* his wife died; and that *Edward Lord Pawlet* entered, and let to him for one-and-twenty years; who entered and put in his cattle, and avers the life of the ſaid *Edward Lord Pawlet*. *Et hoc, &c.*

Hereupon it was demurred, Becauſe this replication doth not *anſwer* nor *confeſs and avoid* THE FREEHOLD of the ſaid *John Marquis of Wincheſter* alledged in the bar.

But ALL THE COURT held, that the bar being a bar at large, the title in the replication being at large, his claiming but a leaſe for years is a ſufficient and good replication, without anſwering to THE FREEHOLD. Wherefore it was adjudged for the plaintiff.

CASE 16.

Vivian *againſt* Shipping.

Trinity Term, 10. *Car.* 1. *Roll* 1194.

In *aſſumpſit* for non-performance of an award, that the plaintiff ſhould pay ten pounds to the defendant, and that the defendant ſhould give a bond to the plaintiff to ſecure the enjoyment of land, *or* pay him forty pounds, an allegation that the plaintiff *hath performed* the award on his part, is ſufficient, without alledging *payment of the ten pounds.* Poſt. 386.

ASSUMPSIT. That in conſideration the plaintiff aſſumed to ſtand to the award of *J. S.* and *J. D.* for certain matters and controverſies betwixt them, and if he failed, to pay the defendant forty pounds; the defendant aſſumed in the ſame manner to pay forty pounds to the plaintiff if he did not perform. The plaintiff ſhews, that the ſaid *J. S.* and *J. D.* made an arbitrament, that the plaintiff ſhould pay to the defendant ten pounds upon the 18th *Auguſt* following; and in conſideration thereof, that the defendant ſhould be obliged to the plaintiff in an obligation of fourſcore pounds, that the plaintiff ſhould enjoy ſuch copyhold lands during the life of the defendant, or that he would upon requeſt pay him forty pounds: and alledgeth *in facto*, that *licet* the plaintiff per-

formed

formed the award on his part, and that he, ſuch a day and place, required the defendant to enter into ſuch a bond, according to the ſaid promiſe, the defendant had not ſealed the ſaid bond, nor had paid him the forty pounds, according to his promiſe. The defendant pleaded, "*nullum tale fecerunt arbitrium*;" and found againſt him.

VIVIAN *againſt* SHIPPING.

1. Roll. Ab. 416. Cro. Eliz. 249. Lutw. 250. 252. Salk. 176. Hardres, 9.

ROLLE now moved in arreſt of judgment, that this declaration is not good: FIRST, Becauſe he doth not alledge the payment of the ten pounds; and the award is conditional in conſideration thereof: ſo if he hath not paid the ten pounds, the other is not bound to make the obligation. SECONDLY, Becauſe he doth not alledge a ſpecial requeſt for the payment of the ſaid forty pounds; and the *aſſumpſit* is to pay upon requeſt, and without requeſt it is not payable; ſo not being ſpecially alledged, the action lies not.

To the firſt JONES and BERKLEY held, that it is a conditional award; and that there is a precedent condition, which if not performed, the other is not bound to make the obligation.

But *I* held the contrary, that it is not a conditional award, for it only appoints, that he ſhall enter into ſuch a bond; and every one hath remedy upon the promiſe, the one againſt the other, if they do not perform the award.

In *aſſumpſit* on an award, the defect of not ſhewing performance is aided by a plea in bar. Ante, 209. 288. Poſt. 386.

But WE ALL AGREED, that although it be a condition precedent, yet when the plaintiff ſaith he hath performed the award on his ſide, it is intended that he hath performed it: and it is good in ſubſtance, though not in form; wherefore the defendant might, if he would, have demurred: and when he hath not demurred, but pleaded to the iſſue, denying the award which is found againſt him, he ſhall not now have advantage of this matter of form.

Lutw. 253. 632. Hob. 82. Cro. Jac. 125. 370. 682. 688.

On an *aſſumpſit* to pay money *upon requeſt*, the general allegation is ſufficient. Ante, 35. Winch. 20.

TO THE SECOND they all agreed, when it is an *aſſumpſit* to pay money, although it is upon requeſt, the general allegation, *licèt ſæpius requiſitus*, is a ſufficient allegation; and the bringing of the action is a ſufficient requeſt for money. Whereupon it was adjudged for the plaintiff.

Cro. Jac. 192. 183. 640. Cro. Eliz. 73. Yelv. 66. Hutton, 2. 4. Leon. 2.

Palmer *againſt* Knights.

CASE 17.

Trinity Term, 10. *Car.* 1. *Roll* 225.

In *aſſumpſit* on a promiſe to ſave the plaintiff harmleſs of all damages and loſſes, &c. a declaration that the defendant had not ſaved him harmleſs, but ſuffered him to be ſued, whereby he was enforced to lay out divers ſums of money, &c. is bad, and not aided by the verdict; for he ought to have alledged a ſpecial requeſt, ſhewn where, for what, and how much he was damnified. Ante 335. 3. Bulſt. 297. Cro. Jac. 652.

ASSUMPSIT. Whereas there was a contract betwixt the defendant and one *Cubit* concerning certain trees growing upon ſuch land; the defendant, in conſideration the plaintiff would cut down or carry the ſaid trees to the defendant's houſe, aſſumed and promiſed to him, that he would ſave him harmleſs of all damages and loſſes which might happen to him by reaſon of ſuch cutting down or carrying away, when he ſhould be thereunto required: and he alledges in fact, that he cut down five of the ſaid trees and carried them to the defendant's houſe, and that the defendant had not ſaved him harmleſs, *licèt ſæpius requiſitus*, but ſuffered him to be ſued at the common law for cutting down and carrying them away;

whereby

PALMER *againſt* KNIGHTS.

whereby he was enforced to lay out divers ſums of money in defence of thoſe ſuits. The defendant pleaded *non aſſumpſit*; and found againſt him, and damages to thirty pounds.

And it was now moved in arreſt of judgment by GRIMSTON, that the declaration is not good, becauſe he doth not ſhew in what court he was ſued, nor what charges he expended, nor how he was damnified, being all in his own knowledge; wherefore he ought to have ſhewn the ſpecial breach, otherwiſe there is not any cauſe of action.

SIR WILLIAM DENNY moved, that the allegation "that he "was put to divers coſts and charges in defence of the ſuit," is ſufficient: and although peradventure this had been cauſe of demurrer, yet having pleaded *non aſſumpſit*, and a verdict found and damages aſſeſſed, it appears he was damnified; wherefore it is now made good, and he ſhall not have advantage thereof.

RICHARDSON was of this opinion at the firſt, that the verdict aids it, otherwiſe clearly it is not good. But JONES, *Juſtice*, and MYSELF held, that the declaration was ill in ſubſtance, no breach being ſufficiently ſhewn; and being ill in ſubſtance, the verdict cannot help it. And to that purpoſe JONES remembered a caſe of *Peck v. Methold*, where an *aſſumpſit* was, that he ſhould deliver ſuch an obligation upon requeſt, after payment of ſuch a ſum: he alledges in fact, that the money was paid, and that, *licèt ſæpius requiſitus*, he had not delivered the obligation: the defendant pleaded *non aſſumpſit*; and found againſt him, and judgment in the common pleas for the plaintiff: and error brought, Becauſe it was not to be delivered but upon requeſt, ſo there ought to be a ſpecial requeſt; which becauſe it was not made, and the year and place alledged of the requeſt, although the iſſue was taken upon the *aſſumpſit* and found, yet it was not good, but the judgment was reverſed: which RICHARDSON remembered; wherefore he agreed, that the declaration was not good, nor aided by the verdict. Whereupon judgment was given for the defendant.

CASE 18.

Hopehill *againſt* Searle.

Hilary Term, 9. *Car.* 1. *Roll* 269.

A leaſe for "*octoginta et ter-*"*decem annos*" ſhall be taken for a term of *ninety three years*, and not for eighty and thirty.
Ante, 33.
2. Roll. Ab. 247. 252.
10. Co. 133. a.
Carth. 204.
Powel on Contracts, 374.

EJECTMENT. Upon a ſpecial verdict the caſe was, That an abbot, in the twenty-firſt year of *Henry* the eighth, made a leaſe for *octoginta et terdecem annos*. The queſtion was only, Whether in this caſe *terdecem annos* ſhall be ſaid to be thirty or thirteen years?

PRESCOT, *for the defendant*, argued, that it ſhould be expounded for thirty years, becauſe it ſhall be taken moſt ſtrong againſt the leſſor, when there is no proper word for thirteen.

But ALL THE COURT held, that it ſhall be taken according to the common parlance for thirteen years; *terdecem* and *treſdecem* are all one, and it is ſo writ *euphoniæ gratiâ*; and it being one entire word, cannot be otherwiſe taken; but if it were written as ſeveral words, it ſhould be otherwiſe: wherefore, without further argument, it was adjudged for the plaintiff. And as BALL, *for the plaintiff*, urged, it being after *octoginta annos*, it ſhall the rather be

ſo

so intended; for if he had meant it for thirty, it should have been one hundred and ten years; but being so writ, they agreed, it was for ninety-three years, and no more. Wherefore it was adjudged accordingly for the plaintiff.

Hopkins *against* Sparks.

Baker *against* Hacking.

Case 19.

Hilary Term, 8. *Car.* 1. *Roll* 347.

UPON a special verdict the case was, *John Cosler* tenant in tail, the reversion over to *Robert Cosler* in fee, they join in a lease for life by deed; and afterwards he in the reversion, during the lease for life, devises that reversion, and dies: afterward tenant in tail dies without issue. The question was, Whether this devise be good or not?

A lease for life made by a tenant in tail and the reversioner in fee is a *discontinuance* not only of the estate in tail but of the reversion also; notwithstanding the tenant in tail die without issue during the life of *cestui que vie*.
See post. 405.

And it was argued at the bar by ROLLE, *for the plaintiff*, and by MAYNARD, *for the defendant*. The doubt was, If tenant in tail join with him in reversion in a lease for life, not warranted by the statute, so as it is a greater estate than tenant in tail can make, whether it be a discontinuance of the tail only, or a discontinuance of the reversion also? for if it be a discontinuance of the reversion, then the devisor had not any power to devise.

But JONES and *I* held, upon the first motion, that it is not any discontinuance of the reversion, because he joins with the tenant in tail; and it is *quasi* a confirmation of the lease during the life of the tenant in tail, and during the time that he hath issue; but after his death without issue, it is the lease of him in the reversion: and during the life of the lessee, it is a discontinuance *quoad* the tenant in tail and his issue; but it is not so as to the reversion, for that remains as it was.—RICHARDSON, *Chief Justice*, inclined to this opinion; but BERKLEY doubted: whereupon it was adjourned till the next Term (*a*).

S.C. Jones, 358. 13. *Hen.* 7. 22-6. 1. Roll. Ab. 633. Hutton, 26. Co. Lit. 326. 335. a. Cro. Eliz. 827. 3. Com. Dig. 20. Powel on Dev. 35.

(*a*) See post. 405.

Hinsley *against* Wilkinson.

Case 20.

Hilary Term, 8. *Car.* 1. *Roll* 302.

ERROR of a judgment in the common pleas in an ACTION UPON THE CASE. Whereas the plaintiff had declared, That he was a copyholder of the manor of *Lull*, whereof a great waste, called *Lull Waste*, was parcel, and the copyholders of the manor having common there, that the defendant being seised of parcel of a wood called *Lull-wood*, adjoining to the said common, maintained conies in the said wood, which run out thereof into the common and eat up the common; whereupon the action was brought. The defendant traverseth the prescription to the common; and it was found against him, and judgment given.

A commoner cannot maintain an action for damage done by the rabbits of another upon the common; for they are then *feræ naturæ*, and he may kill them.
Post. 554.

GERMYN, *for the plaintiff* in the writ of error, moved, that this declaration was not maintainable, Because none can say, when conies are upon the common, whose conies they are: and they cannot be said to be the defendant's conies more than any others,

Jones, 356. 1. Roll. Ab. 90. 405. 2. Bulst. 126. 7. Co. 17. Moor, 421. 2. Will. 51.

Co. Lit. 56. Cro. Jac. 195. 492. 2. Leon, 201. Bridg. 19. 1. Rurrow, 259. 268. 1. Com. Dig. 433. Powel on Devises, 35.

for

HINSLEY *againſt* WERRINSON.

for being out of his ſoil he hath no intereſt in them more than any other, they being *feræ naturæ*, ſo as he hath not any property in them until he takes them; and therefore *Fitzh. Nat. Brev.* 87. & 89. ſaith, they ſhall not be ſaid *cuniculos ſuos*, nor *piſces ſuas* in common rivers: and although the commoner hath loſs, yet it is without injury by the defendant.

GRIMSTON, likewiſe *for the plaintiff*, urged further, that if this action ſhould be maintainable there would be a multiplicity of ſuits, for every commoner would have an action; which ought not to be ſuffered: and here is no more cauſe of action than when one ſuffers his doves to fly into the corn adjoining, for which clearly no action lies; for it cannot be known whoſe doves they are, and the commoner is not at any miſchief, for he may kill them if he can; and for that point cited 5. *Co.* 104. b. *Boraſton's Caſe.*

And ſo held ALL THE JUSTICES here, except BERKLEY, who doubted thereof: wherefore rule was given, that the ſaid judgment ſhould be reverſed, if upon ſuch a day, the next Term, other cauſe was not ſhewn, &c.; which was done to the intent there might be conference with the Juſtices of the common pleas, to know if it had been moved in the common pleas, or if it had paſſed *ſub ſilentio*, being after verdict. And the ſame day *I* conferred with HUTTON, VERNON, and CRAWLEY, Judges of the common pleas, if they knew any ſuch caſe had been moved in their court; and they all ſaid, they did not remember any ſuch to be there moved, but that it paſſed *ſub ſilentio*. And they all held, that an action upon the caſe lies not for a commoner; but he may kill them, for none hath any property in them. Wherefore the judgment was afterward reverſed.

CASE 21.

Bull *againſt* Wyatt.

Livery on a leaſe for life *à die datus* is void; and though the leſſee enter and pay the rent it will not purge the *diſſeiſin*, and make him tenant at will. Ante, 94. 304. Co. Lit. 217. a. 2. Roll. Rep. 109. 1. Roll. Ab. 661. 828. 865. 868. Cro. Jac. 153. 3. Roll. Rep. 229.

EJECTMENT for a garden in *Briſtol*. Upon a ſpecial verdict the caſe was, One *Reignald* and his wife, being ſeiſed in fee in right of his wife, by indenture and with letter of attorney to make livery, lets that garden, HABENDUM *à die datus* (*a*), for life of the leſſee, rendering 6s. 8d. *per annum*; and the attorney made livery the ſame day, *ſecundum formam chartæ*. The leſſee enters and paid the rent; which was always received. The wife dies: her heir, without entry, ſuffers a common recovery, to the uſe of the plaintiff. The queſtion was, Whether this were a good recovery?

ROLLE, *for the plaintiff*, argued, that the leaſe was void, and that livery the ſame day it bears date is void, to make it a good leaſe. —And ſo held ALL THE COURT, and would not admit it to be argued.

(*a*) 3. Lev. 483. Lord Ray. 84. 1242. Salk. 413. Powel on Pow. 487. 501. Cowper, 718. 3. Com. Dig. 278.

SECONDLY, Admitting it to be a void livery, yet he held, that entering and paying his rent he is but tenant at will; as one entering without livery is tenant at will to the feoffor: and he cannot be a diſſeiſor without an intent in him to make a diſſeiſin, and without the intent of the leſſor to have it to be a diſſeiſin; and he is accounted in law but as a tenant at will: and for proof thereof he relied upon 28. *Aſſ.* 11. and 1. *Edw.* 3. *Aſſ.* 7. and the caſe in *Eaſter Term*, of *Blunden v. Baugh*, 4. *Co.* 73. 11. *Hen.* 4. *pl.* 29, 30. 9. *Hen.* 6. *pl.* 6, 7.

THIRDLY,

THIRDLY, Admitting it was *a diſſeiſin*, yet ſuffering a recovery, he and all under him are *eſtopped* to ſay he was not tenant of the freehold; wherefore the recovery is good.—THE COURT inclined to that opinion: but becauſe there were none of the defendant's part in court, no judgment was then given; but ruled, that if cauſe were not ſhewn, &c. judgment ſhould be entered for the plaintiff.

A common recovery ſuffered by huſband and wife of the wife's land bars them and their heirs.

1. Roll. Abr. 865. Raym. 323. See Com. Dig. "Chancery," (4. f. 4.) Co. Lit. 352. Douglas, 53. note (17). 1. Burr. 79.

Prouſe's Caſe.

CASE 22.

PROUSE, an attorney of the king's bench, was elected tithingman of *Taunton*; in which town a cuſtom is pretended to be, that every one ſhall be a conſtable or a tithingman according to their ſeveral houſes; and he having purchaſed two houſes in the ſame town, was, in a leet there held, elected tithingman: and thereupon he brought a writ of privilege to be diſcharged, becauſe he is to be attendant in this court. But the juſtices of peace would not allow thereof, but deſired the Juſtices of aſſiſe to direct whether it ſhould be allowed; who would not meddle therewith, but ordered it ſhould be moved in this court.

An *attorney* cannot be obliged to ſerve the office of tithingman; and a cuſtom that all houſeholders ſhall ſerve the office of conſtable or tithingman by turns, according to the ſituation of their houſes, is bad.

MAYNARD thereupon now moved, that this writ is not to be allowed: for although in truth attorneys and clerks of the court have ſuch a privilege to be diſcharged when they are generally elected, becauſe their attendance being required here, they ſhall not be compelled to attend ſuch an office; yet when there is a ſpecial cuſtom, that they ſhall be elected in courſe according to the ſituation of their houſes, that cuſtom ought to prevail againſt ſuch privilege; for otherwiſe one attorney may purchaſe many of the houſes in the town, and then there ſhall not be ſufficient perſons to do the ſervice; as in truth in this caſe, he hath purchaſed ſeven houſes in the ſaid vill: wherefore he ought to be charged.

Poſt. 585. Noy, 112. March. 30. 2. Keb. 309. 477. 508. 578. 2. Roll. Ab. 272. 1. Lev. 265. 1. Sid. 355. 1. Bl. Rep. 636. 2. Bl. Rep. 1123. Strange, 943. 1143. 4. Burr. 2111. Dougl. 538. 2. Term Rep. 403. 2. Hawk. P. C. 99.

But ALL THE COURT held, that it cannot be a good cuſtom; for then a woman being an inhabitant in one of the ſaid houſes, it may come to her courſe to be conſtable, which the law will not permit; ſo this cuſtom pretended cannot hold place againſt a perſon who is by his office to be attendant here. Whereupon it was ordered that he ſhould be diſcharged.

Stevenſon's Caſe.

CASE 23.

STEVENSON being in execution for a debt to the king adjudged againſt him in the exchequer, was condemned in this court in debt by a judgment, and was brought to the bar by *habeas corpus* to be charged in execution for this debt alſo.

A perſon in execution for a debt due to the king may alſo be charged in execution at the ſuit of a common perſon, except he have a writ of protection.

BING, *Serjeant*, now moved, that he ought not to be charged in execution here, becauſe he is in execution at the king's ſuit; for it is appointed by the 25. *Edw.* 3. c. 19. "That a common perſon ſhall not have execution againſt the king's debtor, until he makes agreement for the king's debt, and then he ſhall have his debtor in execution, and detain him until he hath made ſatisfaction of the debt due to himſelf, as alſo of the debt which he paid for him to the king."—THE WHOLE COURT was of that opinion;

2. Inſt. 32. Godb. 290. Hard. 24. 2. Roll. Ab 159. Cro. Eliz. 164. Dyer, 67. Bunb. 8. 42. 3. Mod. 236. Co. Lit. 131. Cro. Jac. 477. Hob. 115. 1. Show. 65. Parker, 260. Jenkins' Centuries. 213. 4. Term Rep. 316.

Stivenson's Case.

opinion: but forasmuch as he had not a writ of protection, the Court resolved, that he is out of the statute; and thereupon awarded, that he should be in execution as well for the party as for the king.

2. Com. Dig. 648.
3. Bl. Com. 289.

See 33. Hen. 8. c. 39.

Case 24.

Griffyth's Case.

A recognizance *garderet pacem* is good.

SCIRE FACIAS against *Griffyth* upon a recognizance for the peace taken 9th *May*, 9. *Car.* 1.

2. Roll. Abr. 486, 487.

THE FIRST EXCEPTION taken by GRIMSTON was, Because the recognizance was *garderet pacem*, whereas it ought to have been *conservaret pacem*.—*Sed non allocatur*: for so are many of the precedents; and it is as well as *conservaret pacem*.

A *scire facias* on a recognizance of the peace, shewing a breach after the date of the recognizance, is good.

SECONDLY, The recognizance is, that he shall appear at the next general quarter sessions for the said county, and in the interim *gardera le peace*. And it was alledged, that after the recognizance taken, and before the next general quarter sessions, *viz.* 29th *June*, 9. *Car.* 1. he assaulted one SUCH, and beat him, and so brake the peace. The exception was, Because he did not shew the day of the next sessions.—And *I* was of opinion, that for this cause it was ill; for he ought to ascertain the Court when the next sessions was, and so that the breach of the peace was before the said quarter sessions.—But RICHARDSON, JONES, and BERKLEY held, the allegation, that the breach was after the date of the recognizance, and before the next sessions, sufficed. But they would advise until the next Term.

Hilary

Hilary Term,

10. Car. 1. In the King's Bench.

Sir Thomas Richardſon, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Netter *againſt* Percivall Brett.

CASE 1.

Michaelmas Term, 10. *Car.* 1. *Roll* 132.

PROHIBITION being granted to ſtay a ſuit for the probate of a teſtament concerning land and goods, wherein the land was charged with a condition in part for payment of certain legacies, it was prayed to have a conſultation.

Conſultation awarded *niſi* to prove a will of *land and goods*, where the *land* was charged with payment of certain legacies.

JONES and BERKLEY, *Juſtices*, agreed, that they ſhould have a conſultation, becauſe the probate of teſtaments properly appertains to the ſpiritual court, and the probate or non-probate cannot be any prejudice to the heir, nor to him who claims the land by the deviſe; and an inconvenience would enſue, if there ſhould not be a probate concerning the perſonal eſtate, that the executors might not have any actions for debts, nor diſpoſe of the goods. And therefore JONES ſaid, he had ſeen the record of *The Marquis of Winchester's Caſe* (*a*), where the will being for land and goods, conſultation was granted generally.

Ante, 115. 165. Poſt. 396. Jones, 355. 2. Roll. Ab. 315. 535. Salk. 552. 1. Mod. 90. Hard. 313. Cowp. 424.

But *I* doubted thereof, becauſe the land is the principal, and they have no authority to meddle with any will concerning land; and there might be an inconvenience, if the will there ſhould be countenanced or diſcountenanced concerning the land. And becauſe there was a prohibition granted, I was of opinion, the parties ought to purſue the uſual courſe, which is, that the defendant ſhould appear, and the plaintiff declare; and then upon demurrer it might be adjudged, and not upon a motion.

But THE OTHER TWO JUSTICES (RICHARDSON, *Chief Juſtice*, being ſick and abſent) gave a rule, that if other matter were not ſhewn, &c. conſultation ſhould be awarded (*b*).

(*a*) 6. Co. 23.

(*b*) This caſe was moved again; and, after argument by the Judges *ſeriatim*, a conſultation was awarded. Poſt. 396.

Gymlett *againſt* Sands.

CASE 2.

Trinity Term, 8. *Car.* 1. *Roll* 678.

EJECTMENT of a leaſe of *Hugh Beſcavele*. By a ſpecial verdict it was found, that *Humphry Martin* was ſeiſed in fee, and had iſſue *John Martin* by *Hebell* his wife, who by indenture, in conſideration of love to his ſaid wife, and to *John* their ſon and heir apparent, and to ſettle the land upon him and his heirs, enfeoffed

If a verdict find a feoffment by a father (who is tenant for life with remainder to *B.* his ſon) and warranty to the feoffor, the warranty might have an

plaintiff, and that *B.* is his *only ſon* by ſuch a wife, without finding that he is *heir* to the warranty ſhall not deſcend to bar *B.*'s remainder; for he ſhall not be intended heir, as his father had elder ſon by a former wife. *Sed quære.*

GYMETT *against* SANDS.

1. Roll. Ab. 856. 2. Roll. Ab. 421. 702. 741. 2. Leon. 120. 3. Lev. 125, 225.

A. B. and others to the uſe of himſelf for life, without impeachment of waſte; and after to his wife for her life; and after to the uſe of the ſaid *John Martin* and the heirs males of his body; remainder to his right heirs. Afterwards the ſaid *Humphry*, in the 5. *Jac.* 1. infeoffed *John Smith* by indenture, with warranty againſt all perſons; and afterwards, in the 6. *Car.* 1. died. *Hebell* the wife enters: *John* the ſon enters upon *John Smith*, and enfeoffed *Boſcavele* the leſſor with warranty, *John Smith* enters; then *Boſcavele* the leſſor enters, and makes the leaſe in the declaration mentioned; the defendant, as ſervant to *John Smith*, enters and ouſts him. They found that the ſaid *Hebell* was yet alive. *Et ſi ſuper totam materiam, &c.*

Cowp. 826. 1. Term Rep. 741. 4. Term Rep. 75.

ROLLE hereupon argued *for the plaintiff*, FIRST, That the leſſor of the plaintiff hath good title, for he claims by the wife and the ſon, which ſon hath good title to the remainder clearly; and the wife hath a good eſtate for her life; and they had a good title to enter and enfeoff the leſſor of the plaintiff, unleſs it were by reaſon of this warranty: and it is not found, that the *ſon* is HEIR to this warranty of the father's; for although it be found, that the ſaid *Humphry* had iſſue by the ſaid *Hebell* his wife the ſaid *John* in remainder, *unicum filium ſuum*, yet it is not found that he is heir: and it may be that he had other elder ſons by a former *venter*; and the Court will not intend a warranty by ſuppoſition.

If huſband and wife are ſeiſed for life, remainder to their ſon in tail with a fee expectant, and the huſband make a feoffment with warranty, and die, and afterwards the wife and the ſon join in a fine, it is a forfeiture of her eſtate for life, although ſhe did not know of the warranty. Ante, 22. 130. 371. Co. Lit. 215. b. 252. 2. 2. Roll. Ab. 856. 1. Co. 76. b. 2. Lev. 202. 1. Leon 40. Styles, 192. Dougl. 53.

SECONDLY, This feoffment by the wife joining with *John*, who hath the remainder, is no forfeiture, without finding that ſhe had notice of the feoffment and warranty: for as in *Mallory's Caſe*, bargainee by deed inrolled ſhall not enter upon the leſſee for non-payment of the rent, unleſs it were ſhewn that he had notice; and ſo 8. *Co.* 92. a. *Francis' Caſe.*

MAYNARD to the contrary, *for the defendant*, FIRST, He ſhall be intended heir rather than otherwiſe in a ſpecial verdict, becauſe it is found that he had him *unicum filium ſuum*; and it ſhall not be intended there were more ſons without ſhewing.

SECONDLY, That it is a forfeiture; for ſhe ought to have taken notice at her peril when none is bound to give notice, as here none is bound: and there is a difference betwixt a condition and this voluntary act of the feoffment, which is a forfeiture.

JONES and BERKLEY, *Juſtices*, afterwards delivered their opinions, that this warranty is no bar, becauſe it is not found that he was heir; and the rather it ſhall be intended that he is not heir, becauſe it is a collateral warranty, which is not to be favoured (*a*): and it may be that he had elder ſons by another *venter*; or there might be an attainder.

But *I* held the contrary, that the verdict in this point is well enough, and found him heir; for it is found that the indenture calls him *filium et hæredem ſuum apparentem*; and a plurality of ſons ſhall not be intended: and in a ſpecial verdict intendment ſufficeth, eſpecially as this caſe is; becauſe if he be not heir, there is no colour to have a ſpecial verdict. 5. *Co.* 97. *Goodale's Caſe*, that the verdict ſhall be taken by intendment.

(*a*) See 4. Ann. c. 16. ſ. 21. Ante, page 369. *in notis.*

FOR

FOR THE SECOND POINT they all reſolved, that if the warranty had been well found, it were apparent that the eſtate of the ſon was bound, and her joining in a feoffment with the ſon is a forfeiture, as if ſhe had joined with a ſtranger who had nothing to do therewith; and that ſhe at her peril ought to take notice of the ſaid feoffment, becauſe the delivery is a public and notorious act, and the feoffment is a forfeiture at the common law; and it is not like a condition, which is taken ſtrictly: and ſhe ought at her peril to take notice of this act upon the land, none being bound to give her notice. Wherefore as to this point they all agreed; but upon the firſt point they would adviſe. GYMLETT *againſt* SANDS.

CASE 3.

Memorandum.

UPON the 4th of *February*, 10. *Car.* 1. *A. D.* 1634, about the hour of eleven in the forenoon, SIR THOMAS RICHARDSON, *Knight*, *Chief Juſtice* of the King's Bench, died at his houſe in *Chancery-lane*: and all the writs which were ſealed that day bare *teſte* THOMAS RICHARDSON; and all thoſe which were ſealed the next day bare *teſte* WILLIAM JONES, he being ſecond Juſtice of the King's Bench (*a*). RICHARDSON, *C. J.* dies, and is ſucceeded by JONES.

(*a*) 2. Hawk. P. C. ch. 27. ſ. 8.

CASE 4.

Meade *againſt* Thurman.

PROHIBITION was prayed upon ſuggeſtion of this cuſtom, That for tares cut or mown before they are ripe, and given to plough-cattle, tithes ought not to be paid: and upon another cuſtom, for headlands ſown with corn uſed to be fed with plough-cattle, or mowed and cut for that purpoſe, that the owners ſhall be diſcharged of tithes.—And upon this ſuggeſtion, grounded upon ſpecial cuſtoms, THE COURT granted a prohibition. By cuſtom, tares and green corn on headlands, for the purpoſe of feeding cattle of the plough, may be exempt from tithes. Poſt. 403.

S. C. Jones, 357. 1. Roll. Abr. 646. 2. Leon. 27. Bunb. 279. 2. Mod. 498. Lord Ray. 243. 3. Com. Dig. 94. Dougl. 204.

CASE 5.

Dymmock *againſt* Fawcett.

Michaelmas Term, 10. *Car.* 1. *Roll* 148.

ACTION FOR WORDS. For that he ſaid *of* the plaintiff and *to* the plaintiff, being of good fame, and one who had ſerved as captain in the wars, *hæc verba* in *London*, "*Thou art a pimp*;" averring, that in *London* that word was known to be intended "*a bawd*:" and further ſaid, that he was "a common pimp, and "notorious; which he would juſtify." A verdict was found for the plaintiff. "Thou art a "common and "notorious "pimp," are words very ſlanderous, but not actionable, unleſs accompanied by ſome ſpecial damage. Ante, 229. 329. 350. Poſt. 457. Styles, 326. 1 Roll Ab. 37. 1. Roll. 44. 1. Mod. 41. Moor, 10. Hob. 126. 1. Com. Dig. 193. Dougl 382. note (14).

LITTLETON, *the King's Solicitor*, moved in arreſt of judgment, that theſe words are not actionable; for it is a mere ſpiritual ſlander, as "*whore*," or "*heretick*," and puniſhable in the ſpiritual court, and not at the common law. And he ſaid, that divers times ſuits have been in the ſpiritual court for ſuch words, and prohibitions prayed and never granted; *vide* YEAR-BOOK 27. *Hen.* 8. *pl.* 14.; but to ſay that "he keeps a bawdy-houſe," is preſentable in the leet, and puniſhable at the common law.

WARD *è contra*; Becauſe it is ſpoken of one of an honourable profeſſion, *viz.* a ſoldier, and trenches to his diſreputation to be taxed

DYMMOCK *againſt* FAWCETT.

taxed with ſuch a baſe offence. And he ſaid, that ſuch offences have been divers times puniſhed in *London* by corporal puniſhment.

But it was anſwered, that was by cuſtom; and there the calling one whore is actionable.

JONES, *Juſtice*, held, that the action lay not.

We all agreed, that the expoſition and averment, that "*pimp*" is known to be a name for "*a common pandar*," is good.

BERKLEY and *I* agreed, that the words are very ſlanderous, and more than if he had called him "*adulterer*," or "*whoremonger*;" for this is an infamous offence, to be a ſolicitor for others for ſuch baſe offices: and it tends to the breach of the peace to uſe ſuch a courſe of life; and he may be indicted and puniſhed for it corporally.

Wherefore, by the aſſent of JONES, rule was given, that judgment ſhould be entered. But afterward, in *Michaelmas Term*, 11. *Car.* 1. it was moved again; and JONES holding his firſt opinion, BRAMPSTON agreeing with him, the judgment was ſtayed.

CASE 6.

Nichols *againſt* Walker and Carter.

Trinity Term, 10. *Car.* 1. *Roll* 222.

A pariſh by reputation at and before the making the 43. *Eliz.* c. 2. ſhall maintain its own poor, and not be rateable to an adjacent pariſh, in which it was originally a vill.

Hard. 2. Salk. 501. And ſee Mr. Conſt's edition of Bott's Poor Laws, page 64. to page 74. 4. Term Rep. 266.

TRESPASS for entering into his houſe in *Tottridge*, and taking a fowling-piece and other goods. Upon not guilty, a ſpecial verdict was found.

Carter was churchwarden of the pariſh of *Hatfeild*, and *Walker* was overſeer of the poor of the pariſh of *Hatfeild*; and on the 16th of *November* 1632, a rate was made by the inhabitants of *Hatfeild* for relief of the poor of that pariſh, according to the ſtatute. The plaintiff was an inhabitant in *Tottridge*, not having any lands in *Hatfeild*, but having lands in *Tottridge*, and was rated by the ſaid rate at twelvepence the month towards the relief of the poor of *Hatfeild*. The rate, upon the 20th *April* 1632, was allowed by two juſtices of the peace of the ſaid county, whereof one was of the *quorum*, according to the ſtatute: and they demanded this ſum of the plaintiff, and he refuſed to pay; wherefore, by warrant of three juſtices of the peace to levy that ſum upon his goods and chattels, they, by virtue thereof, diſtrained thoſe goods, and ſold them for twenty ſhillings, and offered the reſidue to the plaintiff. And they found, that anciently the village of *Tottridge* was parcel of the pariſh of *Hatfeild*: that there was not any legal act to ſever the ſaid *vill* from the *pariſh* of *Hatfeild*: that *modo et ante tempus cujus, &c.* the tithes of *Tottridge* were paid to the parſon of *Hatfeild*: that the parſon of *Hatfeild* uſed always to find a curate at *Tottridge*: that there is no parſon at *Tottridge*: that for threeſcore years paſt and more, and at the time of the making of the ſtatute of 43. *Eliz.* c. 2. for relief of the poor, *et ſemper exinde uſque hunc diem, dicta villa de* TOTTRIDGE *communiter reputata fuit eſſe parochia de ſe, et per totum idem tempus conſtabularios, gardianos eccleſiæ, et ſupraviſores pauperum dictæ villæ de* TOTTRIDGE *habere conſueverunt per electionem inhabitantium ibidem*: that for all the ſaid time rates, aſſeſſments, and levies, have been made there by them for the relief of the poor of *Tottridge*; which rates, during all the ſaid time, have been uſed to be levied by their proper officers for relief of the poor there, without any paying to the poor of *Hatfeild*, or joining

in

in any aſſeſſment with the town of *Hatfeild*: that the church of *Tottridge*, during all that time, have had all parochial rights; and that the inhabitants of *Tottridge* have not uſed all that time to contribute to the reparation of the church of *Hatfeild*, but to the reparation of their own proper church and chapel only. *Et ſi ſuper totam materiam, &c.* NICHOLS *againſt* WALKER and CARTER.

After argument at the bar by BRIAN, *for the plaintiff*, and by ATKINS, *for the defendant*,

THE COURT reſolved, that judgment ought to be given for the plaintiff: for *Tottridge* being *a pariſh in reputation* ſo long before and after the ſtatute, and at the time of the ſtatute made, it ſhall not be now for this purpoſe charged by *Hatfeild*; but it ſhall be charged by itſelf, and for their poor only: and they relied upon the judgment given in the caſe of *Hilton v. Pawle* (*a*). Hob. 67. Ante, 93.

ATKINS then moved, although it ſhould be allowed that the inhabitants of *Tottridge* be not chargeable with theſe rates, yet upon this verdict the defendants are not guilty, becauſe they did it by warrant from the juſtices of peace; ſo they did it as officers, and therefore excuſable.—*Sed non allocatur*: for the rate being unduly taxed, the warrant of the juſtices of peace for the levying thereof will not excuſe: and it is not like where an officer makes an arreſt by warrant out of the king's court; which if it be error the officer muſt not contradict, becauſe the Court hath general juriſdiction; but here the juſtices of the peace have but a particular juriſdiction, to make warrant to relieve rates well aſſeſſed. Whereupon it was adjudged for the plaintiff.

A warrant to diſtrain for a poor's rate made by the juſtices of *A.* on an inhabitant of *B.* will not juſtify the officer who executes it, if the pariſh of *B.* be unduly taxed. Poſt. 602.

Hardres, 478. 1. Vent. 273. Carth. 346. F. N. B. 81. 10. Co. 76. 2. Bl. Rep. 1142. Salk. 700. 1. Wilſ. 153. 2. Wilſ. 205. 384. 3. Com. Dig. 491. 2. Hawk. P. C. 63. Mr. Conſt's edit. of Bott's Poor Laws, vol. i. p. 201.

(*a*) Ante, 92.

Netter *againſt* Percivall Brett.

CASE 7.

Vide Ante, 391.

THIS Caſe was argued by the Juſtices *ſeriatim*.—JONES and BERKLEY agreed, that conſultation ſhould be granted to prove the will, becauſe it is one entire will, although it be made as ſeveral wills; for that he firſt made his will concerning his goods, and makes the defendant his executor, and appoints therein divers legacies; and after in the ſame paper, leaving the ſpace of a line void, he writes in this manner, "That if his perſonal eſtate ſhall "not ſuffice to ſatisfy his legacies and debts, he appoints part of "the profits of the land to his executors for a time:" and in the concluſion of the will, "IN WITNESS whereof, to this my will I "have put my hand and ſeal;" and thereto ſubſcribed his name and put his ſeal: ſo it appears to be all one entire will.

A will of perſonal effects can only be proved in the ſpiritual court; a will concerning lands *and goods*, if it is one and entire, *ought* alſo to be proved there; a will of lands only *may* be proved there, but not as a *matter of right*. Ante, 115. 165. 391.

And therefore BERKLEY, *Juſtice*, ſaid, that he would inſiſt upon two rules: FIRST, That the probate of teſtaments for perſonal things appertains only and properly to the ſpiritual court; and for the probate of ſuch teſtaments no prohibition lies (*a*). SECONDLY, That the probate of teſtaments concerning lands only, and no goods contained therein, ought not to be proved in the ſpiritual court by compulſion, although they may be proved there; and if there be a ſuit to compel any to prove ſuch teſtaments

1. Com. Dig. 237. 3. Com. Dig. 1. 4. Com. Dig. 199. 511. Powel on Deviſes, 688.

(*a*) 9. Co. 37. Eq. Ca. 207.

NETTER *against* BRATT.

in the ſpiritual court, a prohibition lies: and commonly ſuch wills where the lands are deviſable by cuſtom, are proved before the ordinary; and therefore THE REGISTER, 246. mentions, that wills of land in *London* are firſt proved before the ordinary, and after before the mayor in the huſtings (*a*): and in boroughs a deviſe of lands by cuſtom is as a deviſe of chattels, and ſo termed and reputed. Then when a will is concerning lands and goods, and is one entire will (as the concluſion of this will makes it), and in the will of the land is a clauſe, that "the profits of the lands ſhall be "for the performance of the will," ſo as it is a mixed will, it is reaſon it ſhould be proved entirely in the ſpiritual court, to enable the executor to ſue for debts, and to expedite the payment of the legacies, which otherwiſe might be longer delayed: and the probate of the will for the land will not prejudice the heir, for it ſhall not be evidence at the common law; nor the witneſſes being there examined, their examinations ſhall be given in evidence at the common law. And he cited the reſolution and agreement of all the Judges before the king, that where a teſtament is made of *land and goods*, no prohibition lies to ſtop the probate of the ſaid teſtament for the goods; and that in ſuch caſe the teſtament being mixed of land and goods, probate ſhall be of the entire will, and ought not to be of parcels. And he likewiſe cited the caſe 9. *Eliz. Dyer*, 264. that land was deviſed to be ſold for payment of legacies, the land being ſold, the ſuit for the money to be diſtributed may be in the ſpiritual court, contrary to the opinion in 4. & 5. *Phil. & Mary*, although it be riſing out of the land.

(*a*) R. 88. Co. Lit. 111. a. 2. Inſt. 111. Dal. 117. 29. *Car.* 2. c. 3. 6. Co. 23. b. Cro. Jac. 346. Ante 115.

See the caſe of Hill v. Thornton, ante, 166

And JONES, *Juſtice*, agreed with him in reſpect of the inconvenience which otherwiſe might enſue, if the probate of the teſtament for the goods ſhould be deferred; and they both held, that a conſultation ſhall be awarded. And although it is here granted upon motion without ſpecial pleading and demurrer, yet he ſaid it was good enough; for anciently in this court there were no declarations and ſuggeſtions upon prohibitions, but they were granted upon motions. And conſultations were granted upon motions without demurrer, as in the common pleas.

See Weſtley's Caſe, ante, page 94.

But *I* argued to the contrary, FIRST, That the prohibition is well granted, and upon good grounds; and therefore a conſultation ought not to be awarded. SECONDLY, If it ſhould be awarded, yet it ought to be after plea and demurrer, ſo as the matter might appear in pleading for what cauſe it is granted. TO THE FIRST, that it is well granted, becauſe the prohibition, as it is drawn and granted, doth alledge that the teſtament is made of the land, and no mention of the goods; and thereby is endeavoured to make a probate of this teſtament, which concerns lands only, and ſo to draw into queſtion *laicum feodum*; and always in ſuch caſes a prohibition was granted. And whereas in THE REGISTER it is ſaid, that the probate of teſtaments in *London* is firſt before the ordinary, and then in the huſtings, it was anſwered, that is alledged to be by ſpecial cuſtom; which proves, that without ſpecial cuſtom it ought not to be proved there. And to the reſolution of the Juſtices, that a prohibition ſhall not be granted to ſtop the probate of a teſtament for goods, where it was made for land and goods, that doth not prove that a prohibition may not be granted to ſtop the probate of a teſtament for lands. And, as my brother BERKLEY ſaid,

teſtaments

teſtaments of land only ſhall not be proved in the ſpiritual court; and a prohibition ſhall be granted if they ſo do: ſo here, for any thing which appears to the contrary; and, as it is ſuppoſed in the prohibition, the Court as judges cannot take conuſance that it is otherwiſe: and although the copy of the teſtament be ſhewn unto us, that it is in one entire paper, and one ſeal, and the other circumſtances before mentioned, yet that is but private information, of which we are not to take cognizance as of matter of record. And I aſſented to the caſe in 9. *Eliz.* but upon this reaſon, Becauſe the land being ſold the money is perſonal, and aſſets in the hands of the executors, ſo as it ſavours not of the realty being executed. SECONDLY, I held, That if conſultation ſhould be granted, it ought not to be in this manner, contrary to the uſual courſe, upon a motion, without pleading and demurrer; and as it is here upon an interlocutory ſpeech at the bar only, the ground thereof not appearing of record: and inconvenience would enſue if ſuch courſe ſhould be ſuffered; for the party might be prejudiced, and peradventure erroneouſly, and yet he ſhould not have his writ of error. And for this very cauſe divers precedents have been where prohibitions were granted; as in the caſe of *The Marquis of Wincheſter* (*a*), *Lloyd v. Lloyd* (*b*), *Weſtly's Caſe* (*c*), and *Hill v. Thornton* (*d*), where a prohibition being granted, and a trial had, whether it was a good will, and found good, yet a conſultation was granted only for the goods.

NETTER *againſt* BRETT.

2. Roll. Ab. 316.

1. Roll. Ab. 290. Dyer, 264. a. Caſe 41.

But here in this caſe a conſultation was granted generally.

(*a*) 6. Co. 23. (*b*) Mich. 38. Eliz. Roll 355. (*c*) Ante, 94. (*d*) Ante, 166.

Miller and Jolins *againſt* Manwaring.

CASE 8.

ERROR of a judgment in *Cheſter*, in an ejectment of lands in *Blacon*, of the demiſe of *Sir Randolph Crew*, the 12th of *Auguſt*, 4. *Car.* 1. where, upon a ſpecial verdict, it was found, that

John Earl of Oxford and *Elizabeth* his wife, in right of the ſaid *Elizabeth*, were ſeiſed in fee of the manor of *Blacon*, whereof the land in queſtion is parcel, and had iſſue *John*. Afterwards the ſaid *John Earl of Oxford*, by indenture the 10th of *February*, 27. *Hen.* 8. let that manor to *Anne Seaton* for thirty-four years. That *Elizabeth* died 29. *Hen.* 8.; and on the 21ſt *March*, 31. *Hen.* 8. the ſaid *John Earl of Oxford* died. Afterward, 30th *July*, 35. *Hen.* 8. the ſaid *John* the ſon, then *Earl of Oxford*, by indenture, reciting the leaſe to *Anne Seaton* to be dated 10th *February*, 28. *Hen.* 8. let the ſaid manor to *Robert Rocheſter*, "HABENDUM after the end, ſurrender, "or forfeiture of the ſaid leaſe to *Anne Seaton* for thirty years." and they find, that after the making of the ſaid indenture, the ſaid words "28. *Hen.* 8." were raſed and altered, and made "27. *Hen.* 8.;" and that afterward, *viz.* 26th *March*, 35. *Hen.* 8. the ſaid *John Earl of Oxford*, by indenture betwixt him and *Hamlet Freere* (reciting the leaſe to *Anne Seaton*, 10th *February*, 27. *Hen.* 8.) granted the reverſion of the ſaid manor and premiſes to the ſaid *Hamlet Freere*, "HABENDUM the ſaid manor and premiſes from ſuch time as the "ſame ſhall revert and come to the poſſeſſion of the ſaid earl or his "heirs, by ſurrender, forfeiture, *or otherwiſe*, for ſixty years:" that afterward, in 4. *Eliz.* the ſaid *John Earl of Oxford* died ſeiſed,

Tenant by the curteſy grants a leaſe to *A.*; his heir grants another leaſe to *B.* to commence after that to *A.* in which was a materialeraſure; and another leaſe of the *reverſion* of the lands demiſed to *C*; the next heir grants another leaſe of the premiſes to *D. habendum* from the end of the ſaid leaſes, and miſ-reciting the leaſe to *B.*; the inheritance of the premiſes deſcended to *E.* who made a leaſe to the plaintiff. Poſt. 502.

W. Jones, 354. Abr. 29. 44.

1. Roll. Abr. 849. 2. Roll.

and

MILLER and JOHNS *againſt* MANWARING.

and the ſaid manor deſcended to his ſon *Edward Earl of Oxford* that he by indenture betwixt him and *Geffery Morley*, dated 14th *July*, 15. *Eliz.* reciting, "Whereas *John* his father by indenture, "30th *July*, 35. *Hen.* 8. demiſed to *Robert Rochſter* the ſaid ferm "or manor of *Blacon*, HABENDUM for thirty years, from the end or "determination of the leaſe made to *Anne Seaton*, dated 10th *Fe-* 1. Levinz, 234. "*bruary*, 27. *Hen.* 8. for twenty-four years" (which is a falſe recital, for in *Rocheſter*'s leaſe it is recited, that the leaſe to *Anne Seaton* was dated 10th *February*, 28. *Hen.* 8.), "and re-granted the leaſe "to *Hamlet Freere* for ſixty years, to begin after the expiration, "ſurrender, or forfeiture (omitting the words "*or otherwiſe*"), of "the leaſe to *Anne Seaton*, the ſaid *Edward Earl of Oxford* de-"miſed the ſaid manor and ferm of *Blacon* to the ſaid *Geffery Morley*; "HABENDUM from the end of the ſaid leaſes, for fifty years." And if, &c.

The queſtion is, Which of theſe leaſes are good?

So the queſtion was, Whether any of theſe leaſes to *Hamlet Freere* or *Morley* be good, and were *in eſſe* at the time of the leaſe made by *Sir Randolph Crew*? for *Sir Randolph Crew* claimed the inheritance of the manor from the *Earl of Oxford*, and *Sir William Norris* claimed the leaſes from *Morley* and *Freere*, and under him the defendant claimed. And judgment was given in *Cheſter* for the plaintiff.

And now error was brought of this judgment; and the error aſſigned in point of law, that judgment was given for the plaintiff, where it ought to have been given for the defendant. And after ſeveral arguments at the bar by ROLLE, and MASON, *Recorder of London*, *for the plaintiff* in the writ of error, and CALTHROP and SERJEANT HEDLEY, *for the defendant*, it was now this Term argued by the Juſtices *ſeriatim*; and all the Juſtices agreed, that the judgment in *Cheſter* was well given, and ſhould be affirmed.

If a tenant by the curteſy make a leaſe for years reſerving rent, the leaſe is ſo abſolutely determined by his death that no acceptance of rent by the heir can make it good.

Plowd. 30. 272. Jones, 354. Vaugh. 80. 3. Bac. Ab. 397, 398. 1. Roll. 830. Cowp. 595. Dougl. 50.

THE FIRST QUESTION moved was, Whether the leaſe to *Anne Seaton* was determined after the death of *John Earl of Oxford* who made it, who was ſeiſed thereof in the right of his wife, and tenant by the curteſy, or only determinable by the entry of the heir? for if it were only determinable, then, no entry of the heir being found, it was continued, and the reverſion was in the *Earl of Oxford* the ſon at the time of the leaſe made to *Hamlet Freere*.—But for this point, upon the firſt argument, RICHARDSON, then living, agreed with the other Juſtices, that it was determined and void by the death of the ſaid *John* then *Earl of Oxford*, tenant by the curteſy, the wife being dead before, and then *Anne Seaton* was but tenant at ſufferance, and the freehold in the *Earl of Oxford*, and no reverſion; and for that point over-ruled it without further argument; for it is abſolutely determined by the death of the tenant by the curteſy; and no acceptance of the rent, or confirmation after by the heir, can make it have continuance. *Vide* 1. *Edw.* 6. "*Ac-*"*ceptance*," 19. 2. *Co.* 77. the caſe of *Harvy v. Thom*, cited 8. *Co.* 34. in *Payn's Caſe*.

A leaſe to commence after the determination of a prior leaſe ſhall begin preſently, if the prior leaſe was void in law. 2. Bac. Ab. 663.

SECONDLY, When the leaſe to *Rocheſter* began?—And as to that ALL THE JUSTICES reſolved, that it began preſently at the time of the ſealing, becauſe there was no ſuch leaſe *in eſſe* to *Anne Seaton* at the time of the leaſe to *Rocheſter*, but determined three years be-

Poſt. 502.—1. Roll. Ab. 849. Hob. 129. Co. Lit. 46. b. 3. Bac. Ab. 427.

fore,

fore, by the death of the ſaid *Earl of Oxford*; and there was no ſuch leaſe made to *Anne Seaton* but had other beginning and other ending than is recited; and therefore it began preſently. *Vide* 3. *Edw.* 6. *Br.* "*Leaſes*," 62. 6. *Co.* 36. a. *in the Biſhop of Bath's Caſe*; *Plow. Throgmorton's Caſe*; *Co. Lit.* 46. b. 4. *Co.* 74. a. *Dy.* 116.

MILLER and JOHNS *againſt* MANWARING.

THIRDLY, The leaſe to *Rocheſter* being raſed in a material part after the ſealing and delivery thereof, Whether that raſure be a cauſe to make the leaſe void, or if the leaſe be good notwithſtanding this raſure?—And JONES and BERKLEY, *Juſtices*, held, that the deed is voided by the raſure, but the leaſe is good, and remains *in eſſe* notwithſtanding this raſure: and as to that took a difference when an eſtate loſeth his eſſence by a deed, *viz.* where it may not have an eſſence without a deed, as a leaſe by a corporation, or of tithes, or grant of a rent-charge, or ſuch like, if the deed be raſed after delivery, it determines the eſtate and makes it void; but when the eſtate may have eſſence without a deed, there although it be created by a deed, and the deed is after raſed by the party himſelf or a ſtranger, that ſhall not deſtroy the eſtate although it deſtroys the deed; wherefore raſure here doth not make the leaſe void and determine it.—But *I* argued to the contrary in this point, that foraſmuch as it is a leaſe by the deed, it is a contract by the deed, and the party himſelf who hath the intereſt by the deed raſing that deed, he determines the deed, and his intereſt by his voluntary act, as if he had ſurrendered; and the contract being by deed, he may not determine the deed and the covenants, but *quoad* himſelf he doth deſtroy it, but peradventure *quoad* the leſſor it may have eſſence, if the leſſor will; but this is at his election, and not at the election of the leſſee. *See for this point*, 11. *Co.* 27. *Dy.* 261. 10. *Co.* 97. *in Doctor Leyfeild's Caſe*, 7. *Edw.* 3. 57. 14. *Hen.* 8. 27. *per Brook*, 44. *Edw.* 3. 42. (*a*).

A grant of incorporeal hereditaments is deſtroyed by an eraſure made in the deed after it is delivered; and *quære*, if the intereſt in things corporeal would ſurvive.

5. Co. 119. Co. Lit. 225. a. 308. 338. Cro. Eliz. 626. 2. Roll. Ab. 28. 1. Roll. Rep. 40. 2. Bulſt. 247. Dyer, 27. 1. Vent. 185. 297. 2. Lev. 113. 11. Co. 27. a. 3. Bac. Ab. 463.

FOURTHLY, Whether the leaſe to *Hamlet Freere* be good or void? And that reſts upon conſideration, whether the leaſe of the land by the name of a reverſion, where he hath the land in poſſeſſion and hath no reverſion (as it is if *Seaton*'s leaſe be determined in fact, and *Rocheſter*'s leaſe be void by the raſure, or that he be not in poſſeſſion by virtue of the leaſe, becauſe it is not found that *Rocheſter* entered by virtue of the leaſe, and ſo cannot be an eſtate turned into a reverſion), be a good leaſe?—And for this point ALL THE JUSTICES agreed, that it is merely a void leaſe; for the grant in the premiſes is only of a reverſion, and it was the intent of the parties to paſs the reverſion only expectant upon the former leaſes: and when there is not any reverſion, it cannot paſs the land in poſſeſſion; for by the name of a reverſion lands in poſſeſſion cannot paſs, but by the name of land a reverſion may well paſs; for he who will grant lands in poſſeſſion, will rather grant them in reverſion; but not ſo *è converſo*. And although the *habendum* is "to "have and to hold" the land, that ſhall not paſs the land in poſſeſſion, for it is intended he ſhould have the lands ſo returning. And deeds are to be conſtrued, that they ſhall paſs things according to the intent of the parties, and the ſtrongeſt againſt the grantor

Tenant in fee grants a leaſe of *the reverſion* of the ſaid premiſes after the determination of a leaſe of them made by his anceſtor; the anceſtor's leaſe became void by his death; this ſecond leaſe therefore is alſo void, for the leſſor being in *poſſeſſion* had no *reverſion* to grant. Ante, 110.

19. Co. 107. b. Vaugh. 83. Plowd. 150. Co. Lit. 22. b.

Jones, 355. 3. Com. Dig. 223.

(*a*) See alſo as to this point 29. Car. 2. c. 3. which makes it neceſſary that all leaſes for more than three years ſhould be in writing; and therefore the deed or writing is of the eſſence of the leaſe. See 3. Bac. Abr. 464.

according

Miller and Johns *againſt* Manwaring.

according to the apparent intent: and here the grant and demiſe is only of a reverſion, and the *habendum* ſhall enlarge it contrary to the grant; ſo this leaſe to *Hamlet Freere* is merely void; and if it be not void, it is determined in time, for it began from the date, and then it is determined by effluxion of time. See expreſs authorities, that by the grant of a reverſion, if he hath not a reverſion, nothing paſſeth, *Co. Lit.* 46. 324. b. 10. *Co. Lofeild's Caſe.* This point is recited to be ſo reſolved, 5. *Co.* 124 b. *Saffyn's Caſe*; *Plow.* 196. 423. 433. 146. in *Throgmorton's Caſe.* And where it was ſaid, that the words "and other the premiſes" would carry it, it was anſwered, that cannot be, for "other" is always another thing than that before mentioned; and the reverſion of the manor of *Blacon* is expreſsly mentioned, ſo "other" cannot be extended to it. *Vide* 1. *Co.* 177. a. 35. *Hen.* 8. "*Grants*," *Br.* 150.

Ante, 155.

R. 212.

A leaſe intended to commence in *future*, which miſ-recites the prior leaſe on which it depends in a material point, ſhall begin immediately. Co. Lit. 45. b. Dyer, 116. Plowd. 148. Lev. 77. 2. Leon. 11. 242. Vaugh. 73. 3. Ed. Ab. 427.

THE FIFTH QUESTION was, Whether *Morley's* leaſe was *in eſſe* at the time of this leaſe made by the plaintiff?—And IT WAS RESOLVED that it was not, for that miſ-recites the former leaſes, and ſo hath the ſame rule as the former, where it recites leaſes and there be not ſuch; therefore it ſhall begin from the date, which being in 15. *Eliz.* for fifty years, ended 1623. Wherefore for all theſe reaſons the judgment was affirmed.

Case 9.

Sir John Stonehouſe and Elizabeth his Wife *againſt* Sir John Corbet.

In waſte, the plaintiff ſhews a fine to *B.* for life, to *A.* in tail, to the plaintiff in fee; that *A.* died, *per quod B.* was ſeiſed for life, and committed waſte to the diſheriſon of plaintiff: this ſupplies the omiſſion that *A.* died *without iſſue.*

Jones, 354. 2. Roll. Ab. 831. Yelv. 140. Cliſt. 819. 2. Saund. 230. 234. Hob. 1. 84. Cro. Eliz. 57. 1 Leon. 48. 5. Com. Dig. 371. 1. Term Rep. 141.

ERROR of a judgment in the common pleas in *waſte.* Divers errors were aſſigned concerning the waſte, and the proceedings therein; all which being over-ruled,

One main error was aſſigned *ore tenus* by HENDEN, *Serjeant*, at the bar, For that in the action of waſte he declares, that *Sir Richard Corbet* was ſeiſed in fee, and in *Eaſter Term*, 8. *Jac.* 1. levied a fine of that land to the uſe of himſelf for life; and after to the uſe of *Elizabeth* his wife for her life; and after to the uſe of himſelf and the heirs males of his body; and after to the uſe of *Sir John Corbet*, plaintiff, and the heirs males of his body, and to the uſe of the heirs of *Sir Richard Corbet*: and that afterwards, in *Hilary Term*, 8. *Jac.* 1. the ſaid *Sir Richard Corbet* levied another fine of the ſame land to the uſe of himſelf for life; and after to the uſe of *Sir John Corbet* and the heirs males of his body; and after to the uſe of the right heirs of the ſaid *Sir Richard*: that afterwards *Sir Richard* died, and that his wife entered, and was ſeiſed for term of her life, the reverſion to the plaintiff; and that afterward ſhe married *Sir John Stonehouſe*, and committed waſte *ad exhæreditationem* of the plaintiff. The error aſſigned and inſiſted upon was, That the plaintiff hath not ſufficiently entitled himſelf to the reverſion to puniſh the waſte, becauſe he doth not alledge that *Sir Richard Corbet* was dead without iſſue male; and if he be not dead without iſſue male, the plaintiff cannot puniſh this waſte: and although the defendant by pleading to the waſte, hath admitted it to be to this diſinheritance, yet intendment ſhall not help it, being matter of ſubſtance.

But

But it was thereto anſwered, That foraſmuch as it is ſaid ſhe entered and was ſeiſed for life, the remainder to the plaintiff, it is intended that *Sir Richard* is dead without iſſue: alſo, he alledging it to be done to his diſinheritance, that cannot be if the other had any iſſue alive; and the verdict hath found it to be to his diſinheriſon, by which it is to be intended, that *Richard* died without iſſue. Sir John Stonehouse and his Wife *againſt* Sir John Corbet.

Wherefore Berkley and Myself held it to be no error; but Jones doubted thereof.—Afterward, upon another motion, it was adjudged, that the firſt judgment ſhould be affirmed. *Vide* 5. *Edw.* 3. *pl.* 37. 7. *Edw.* 3. *pl.* 46. 13. & 14. *Eliz. Dy.* 304. 10. *Co.* 63. *Nuper, &c.* Ante, 381.

Bowton *againſt* Nicholls.

Case 10.

The defendant ſhall not have coſts on a writ of error brought by the plaintiff in the original action; for no execution is thereby delayed. Ante, 145. 175. 363. Cro. Eliz. 617. Cro. Jac. 636. 2. Andr. 123. 1. Bac. Ab. 524. 4. Mod. 7. 2. Com. Dig. 555. Dougl. 751. in notis.

Error of a judgment given in the common pleas; where judgment was given for the defendant, and that judgment here affirmed, and ten pounds coſts given here to the defendant upon the ſtatute of 3. *Hen.* 7. c. 10. (*a*).

Grimston now moved, that coſts were not grantable: for the ſtatute is, where judgment is given *againſt* the defendant or tenant, and he, to delay the execution, brings a writ of error, and the judgment is affirmed, that he ſhall have coſts for delaying his execution. But here the judgment is given for the defendant in the common pleas, ſo no execution was to be awarded there againſt him; but the plaintiff was barred; and although the plaintiff brought the writ of error, and the judgment is here affirmed, yet it is out of the ſtatute.

All the Court were of this opinion, upon conſideration of the ſtatute; wherefore a *ſuperſedeas* was awarded to ſtay execution for the coſts.

(*a*) But now by 13. Car. 2. ſt. 2. c. 2. if error be brought of a judgment after verdict, and the judgment be affirmed, the defendant in error ſhall have double coſts; and by 3. & 9. Will. 3. c. 11. if the plaintiff, after any judgment for the defendant, ſue error, and afterward diſcontinue, or be nonſuited, or have judgment againſt him, the defendant ſhall have coſts.

11. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*
Sir William Jones, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Robert Berkley, *Knt.*
Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Memorandum.

CASE 1.

THE firſt *Saturday* of this Term, being 18th *April* 1635, SIR JOHN BRAMPSTON, *Knight*, of the *Middle-Temple*, one of the King's Serjeants, was made Chief Juſtice of the King's Bench. And firſt the Lord Keeper made a grave and long ſpeech, ſignifying the king's pleaſure for his choice, and the duties of his place: to which, after he had anſwered at the bar, returning his thanks to the king, and promiſing his endeavour of due performance of his duty in his place, he came from the bar into court, and there kneeling, took the oaths of ſupremacy and allegiance according to the ſtatute 3. *Jac.* 1. c. .: then ſtanding he took the oath of Judge; which is the ſame oath that all other Judges take: then he was appointed to come up to the bench, and then his patent (which was only a writ to attend the office) being read by BROOME, *Secondary*, the Lord Keeper delivered it to him. But JONES ſaid, that the patent ought to have been read before he came up to the bench.

BRAMPSTON appointed Chief Juſtice of the King's Bench. Ante, 225.

R. 128.

R. 125.

Anonymous.

CASE 2.

A PROHIBITION was prayed by GRIMSTON to the ſpiritual court for ſuing for tithes of lambs; ſurmiſing the cuſtom to be, That if one hath lambs under the number of ſeven, he ought to pay a halfpenny for every lamb under that number in lieu of all tithes of lambs; and if he had but ſeven, the parſon ſhould have the ſeventh lamb, and ſhould pay threepence; and if he had eight, he ſhould pay twopence; and if he had ten, the parſon ſhould have the tenth without paying any thing.—BERKLEY and JONES, *Juſtices*, held, that the canon law is ſo, and ſo received in the ſpiritual court: and it is ſurmiſed, that the ſpiritual court allows of it; and therefore there needs not any prohibition. But becauſe it was alledged that it was a cuſtom, and the parſon would ſtay until the tenth, and would refuſe to accept according to the cuſtom, and that in the ſpiritual court this ſurmiſe is not allowed; therefore BRAMPSTON, *Chief Juſtice*, and MYSELF conceived, that a prohibition is grantable for that cauſe: and JONES and BERKLEY agreed, that it ſhould be granted; and the party might demur if he would.

To pay a penny for every lamb under the number of ſeven, or the ſeventh lamb, the parſon paying twopence, &c. is a good *modus*.

1. Roll. Abr. 648. 651. Cro. Jac. 42. Latch. 254. Dougl. 204.

ALSO,

A preſcription not to pay tithes of *aftermowth* in conſideration of making the *firſt tonſure* into hay is good.

ALSO, for tithes of aftermowth, that there is a cuſtom, in conſideration that he ſhould make the firſt tonſure into good and ſufficient hay, and ſet it out in cocks ſufficiently dried and ready to carry, that he ſhould be diſcharged from the payment of tithes of the aftermowths.—And THAT WAS HELD a good ſuggeſtion, by reaſon of the coſts he beſtowed in making it to be perfect hay.

Cro. Eliz. 660. Moor, 910. Cro. Jac. 42. 116. 12. Mod. 498. Bunb. 10. 314. 3. Com. Dig. 94. 1. Roll. Ab. 649. Hob. 250. Dougl. 204.

Tithe of bees may be diſcharged by a cuſtom to pay tithe of their honey, wax, and the expences of hiving them.

AND upon a ſurmiſe made that he was ſued for tithes of bees, that in conſideration he paid honey and wax, and was at the charge for hives and maintenance of them in winter, he ſhould be diſcharged of the tithes of the bees themſelves.—And upon theſe ſurmiſes a prohibition was granted, being one of the firſt caſes moved after BRAMPSTON was made Chief Juſtice.

Poſt. 559. F. N. B. 51. 1. Roll. Ab. 651. 3. Com. Dig. 99. Dougl. 204.

CASE 3.

Hawkings *againſt* Billhead.

Trinity Term, 10. *Car.* 1. *Roll* 1312.

Although it appear upon the proceedings that an action was not brought within the time of limitation, yet the defendant cannot take advantage of it on motion, but muſt plead the ſtatute. *Vide* ante, 381.

ACTION FOR WORDS. Whereas the plaintiff was of good name and fame, and of a chaſte converſation, and divers had offered to marry unto him their daughters; and whereas he was in communication with one *William Ruſſell* to marry his daughter, and the ſaid *William Ruſſell* was willing to have his daughter to match with him, and offered forty pounds in marriage; that the defendant, having communication with one *J. S.* and others of the plaintiff, on the twentieth of *September*, 7. *Car.* 1. to diſcredit the plaintiff and hinder him of his marriage, ſaid of the plaintiff, "That the plaintiff had lain with ſuch a woman and others, "and them *carnaliter cognovit*;" by reaſon whereof the ſaid *William Ruſſell* utterly refuſed to give his daughter to match with him; and that he cauſed the plaintiff to be proſecuted in the archdeacon's court for that incontinency; and thereupon he brought his action in this court in *Michaelmas Term*, 10. *Car.* 1. The defendant pleaded not guilty; and found againſt him.

Ld. Raym. 838.

And now MAYNARD moved in arreſt of judgment, that theſe words being ſpoken 20th *September*, 7. *Car.* 1. and the action being brought in *Michaelmas Term*, 10. *Car.* 1. (whereas it ought to be brought within two years by the ſtatute of 21. *Jac.* 1. of limitations) by his own ſhewing, it is brought for words ſpoken above two years; and therefore he is to be barred of this action.

But becauſe he had admitted the action, and had not pleaded the ſtatute of limitations, but not guilty; JONES and BERKLEY, *Juſtices*, held, that he ſhall not now have advantage thereof. And JONES ſaid, that he knew it had been ſo ruled twice in the time of the LORD LEA, *Chief Juſtice*, and in the time of SIR RANDALL CREW, *Chief Juſtice*; for otherwiſe there ſhould be a miſchief in this court more than in another court, *viz.* in the common pleas, where they proſecute by original and outlawry; and if the outlawry be reverſed, the ſtatute aids the plaintiff. But here they proceed by *latitat*, whereby the cauſe of the action doth not appear, and may peradventure divers years continue by proceſs, before the defendant may be arreſted (*b*): and the plaintiff in his declaration needs not ſhew the cauſe wherefore he did not commence his ſuit ſooner; for if he ſhould do ſo, the declaration would be more prolix than was con-

(*b*) Ld. Raym. 383. 435. 885.

venient. But if the defendant pleads the ſtatute of 21. *Jac.* 1. c. . then the plaintiff by the replication ought to ſhew good cauſe why he did not bring his action within the time limited by the ſtatute (*a*), otherwiſe he is to be barred; for the ſtatute allows of many impediments, *viz.* infancy, impriſonment, *ouſter le mer*, and others therein mentioned, which ſhall be ſufficient cauſes that the action was not brought ſooner (*b*).

HAWKINGS *againſt* BILLHEAD.

(*a*) 2. Buſt. 961.

(*b*) Stra. 836. 1. Wilſ. 134. 2. Wilſ. 145. Dougl. 656.

But *I* doubted thereof, becauſe by his own ſhewing, it appears that the action is not brought within the time limited by the ſtatute, and the ſtatute is in the negative, "that it ſhall not be brought "but within the time;" ſo the Court *ex officio* ought to abate it, unleſs he had ſhewn wherefore it was not brought within the time.

But by the opinion of THE OTHER JUSTICES it was adjudged for the plaintiff, unleſs other cauſe, &c.

The Caſe of Baker *againſt* Hacking.

CASE 4.

Vide ante, Page 387.

THIS caſe was now this Term argued at the bar, and after at the bench. And BRAMPSTON, JONES, and BERKLEY, *Juſtices*, argued, that the deviſe was void; for they all held, that the leaſe for life is only the leaſe of the tenant in tail during his life and the life of the leſſee, and then it is a diſcontinuance, and the reverſion taken from him in reverſion is diſplaced; and then he, having nothing in the reverſion but only a right, cannot make a deviſe, for the leaſe being a leaſe for life, rendering a pepper-corn, is not warranted by the ſtatute of 32. *Hen.* 8. c. 28. and then being a leaſe for life of the leſſee, the livery is only made by the tenant in tail, for he hath the ſole power of the immediate freehold and the immediate poſſeſſion and inheritance: then when they make a leaſe for life, it is an immediate wrong to the intail, and diſcontinues the eſtate-tail during the life of the leſſee; and the tenant in tail hath gained a new fee, and is ſeiſed of a reverſion in fee expectant upon the eſtate for life during the leaſe, and it is a new reverſion in the plaintiff. And for that they relied upon THE YEAR-BOOKS 11. *Hen.* 7. and 13. *Hen.* 7. If there be tenant in tail, remainder to his right heirs, he may be reſtrained by a condition not to alien, for his feoffment is there held a diſcontinuance. And JONES cited a caſe adjudged, *Lord Cromwell v. Andrews* (*a*): Tenant in tail, remainder to his right heirs, makes a feoffment by deed, and delivers the deed to the feoffee, and after livery is made by an attorney; the queſtion was, Whether the remainder paſſed by the delivery of the deed? for then livery to him in remainder had not been a diſcontinuance. But it was reſolved, that it was a diſcontinuance; and there is no difference when tenant in tail, remainder to his right heirs, makes a feoffment, and when he in reverſion and tenant in tail join in a leaſe for life, which is a diſcontinuance; and it is a diſcontinuance preſently, or it cannot be a diſcontinuance by the death of the tenant in tail having iſſue; for, as BRAMPSTON ſaid, the change of the reverſion

A leaſe for life not warranted by 32. *Hen.* 8. c. 28. made by a tenant in tail and the reverſioner in fee, is *a diſcontinuance* not only of the eſtate in tail, but of the reverſion alſo, notwithſtanding the fee is in the reverſioner by the death of the tenant in tail without iſſue, provided the leſſee ſurvive.

1. Roll. Ab. 633. 2. Roll. Ab. 59. 121. 1. Lev. 36. Co. Lit. 224. 326. 335. Moor, 91. 281. 2. And. 210. Lut. 732. 3. Com. Dig. 76. Pow. Dev. 35. Bull. N. P. 100. 3. Com. Dig. 76. Cowp. 702. H. Bl. Rep. 269.

(*a*) Cro. Eliz. 15.

BAKER *againſt* MACKING.

is preſently by the livery or not at all, and it is not changed by the death of the tenant in tail having iſſue; and that being a leaſe for the life of the leſſee, cannot be conſtrued to be a leaſe for the life of the tenant in tail (as it ſhall be conſtrued if it be not a diſcontinuance), and after his death without iſſue, a leaſe for life againſt him in reverſion. Wherefore they all concluded, that it was a diſcontinuance, and judgment ought to be given for the defendant.

But *I* argued to the contrary, that it is not any diſcontinuance, nor the reverſion diſplaced: FIRST, Becauſe it ſhall not be taken to be a tortious leaſe and a diſcontinuance, when by any means it may be conſtrued a good and rightful leaſe; and it may be here ſo conſtrued, when tenant in tail and he in reverſion join, for it is an eſtate derived out of both their eſtates, *viz.* a leaſe of the tenant in tail as long as he lives, and afterward of him in reverſion, as *Treport's Caſe* (*a*) is reſolved. SECONDLY, It is no diſcontinuance, becauſe they join in the leaſe, for he in reverſion joins in the act of making of this leaſe, and ſo it is not the intention of any of the parties to diſinherit him in reverſion, and to take away or diſplace the reverſion: wherefore the law ſhall not make any ſuch conſtruction; eſpecially here, when tenant in tail is dead without iſſue, there is not any iſſue againſt whom there ſhould be a diſcontinuance; and it is not a diſcontinuance to the reverſion, becauſe he joined. To prove this was vouched *Bredon's Caſe* (*b*). And an act may be a diſcontinuance now, and not a diſcontinuance by matter *ex poſt*; as if tenant in tail infeoff him in reverſion and a ſtranger, and he in reverſion ſurvive, it is no diſcontinuance. So if huſband and wife make a leaſe for life, by deed, of lands of the wife, if the wife, after the death of the huſband, agree, it is no diſcontinuance; but if ſhe diſagree, it is a diſcontinuance. So here, if tenant in tail had died having iſſue, it might have been a diſcontinuance againſt the iſſue; but if otherwiſe, it is againſt the intent of the parties to conſtrue it to be a diſcontinuance when tenant in tail hath no iſſue.

Bill. N.P. 100. 1. Lev. 36.

But ALL THE OTHER JUSTICES held it to be a tortious act in itſelf, and that although he hath not afterward any iſſue, it is not material: wherefore it was adjudged for the defendant.

(*a*) 6. Co. 14. Co. Lit. 45. a. (*b*) 27. *Hen.* 8. *pl.* 13. 1. Co. 76. a.

CASE 5.

Mayo *againſt* Cogſhill.

In ejectment againſt huſband and wife, if HE is acquitted, and SHE is found guilty; judgment *quòd capiantur*, againſt both, is not error. Poſt. 513. *contra.*

ERROR of a judgment in ejectment againſt huſband and wife. The defendants pleaded not guilty, and the wife was found *guilty*, and the huſband found *not guilty*; and judgment againſt the huſband and wife, *quòd capiantur.*

The error was aſſigned for this cauſe, Becauſe the judgment ought to have been againſt the wife, *quòd capiatur*, and not againſt the huſband where he is acquitted, for he ought not to be impriſoned for his wife's offence.

Cro. Eliz. 381. Sty. 1167. 1287. 1. Roll. Ab. 221. Moor, 704. Cro. Jac. 205. 440. 9. Co. 78. a. Hob. 98. 101. Wilſ. 149.

But

MAYO *against* COOSHILL.

But ROLLE, *for the defendant* in the writ of error, moved, that it is not any error, and that the judgment in this case ought to be against them both, *quòd capiantur*; for it is only for the fine to the king, and the imprisonment is no longer but until the fine be paid, and the husband ought to pay it, for the wife cannot. And to prove this he cited a precedent in this court, *Lewes v. White* (*a*), where, in a writ of error upon a judgment in the common pleas, in trespass against husband and wife, they pleaded not guilty, and the husband was acquitted, and the wife only found guilty; and the judgment was against them both, *quòd capiantur:* and it was assigned for error for this cause, and the judgment affirmed. And BROOM, *the Secondary*, said, that so are all the precedents of this Court.

THE COURT therefore here awarded accordingly, that, notwithstanding this error, the judgment should be affirmed.

Judgment in trespass reversed for want of *vi et armis* in the declaration. 7. *Hen.* 6. 13. 1. Saund. 81.

But then another error was assigned, That in the declaration there was not *vi et armis*; and upon view of the record it appeared, that it was in the writ *vi et armis intravit*, &c. but in the count it was omitted.—Wherefore for this cause the judgment was reversed (*b*).

1. *Hen.* 7. 19. 2. Roll. Ab. 221. F. N. B. 86. Cro. Jac. 443. 526. 536. Salk. 636. *Ld.* Raym. 985. Carth. 66. 2. Bac. Ab. 92.

(*a*) Cro. Jac. 203. Ab. 191. Carth. 396. 3. Mod. 285. Runn. Eject. 131.
(*b*) See 16. & 17. Car. 2. c. 8. 5. & 6. Will. & Mary. c. 12. 4. Ann. c. 16. 5. Bac.

Trinity Term,

11. Car. 1. In the King's Bench.

Sir John Bramſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

Buſhell, Hurſtwayt, and Brand, *againſt* Yaller.

Trinity Term, 10. *Car.* 1. *Roll* 456.

The principal and bail cannot join in a writ of error on the principal judgment. Ante, 300. Poſt. 481. 561. 575. Cro. Jac. 384. Hob. 72. Godb. 440. 1. Lev. 137. 2. Bac. Abr. 199. 1. Term Rep. 279. 3. Term Rep. 69.

ERROR of a judgment in the common pleas, by *Buſhell* the defendant, and *Hurſtwayt* and *Brand* the bail, in the common pleas, againſt *Yaller*.

GRIMSTON aſſigned for error, That no *capias* was awarded againſt the principal, and yet a *ſcire facias* iſſued againſt the bail, and judgment againſt them.

It was now moved, that this writ of error brought by the bail and the principal was not good, for they ought not to join in a writ of error; for the bail may not avoid the judgment againſt the principal by any error which is in the proceeding, and the principal hath nothing to do with the judgment againſt the bail.

And ALL THE JUSTICES were of that opinion, except BERKLEY, who doubted thereof, becauſe by the judgment againſt the principal the bail is damnified; wherefore he conceived they ſhould join in the error to avoid the principal judgment. But he agreed, that the principal ought not to join in a writ of error to reverſe the judgment againſt the bail; and afterward he conſented with the other Juſtices, that a writ of error lies not in this manner. Wherefore it was abated.

CASE 2.

Townſend *againſt* Hunt.

Hilary Term, 11. *Car.* 1. *Roll* 774.

An *aſſumpſit* will lie, although the conſideration be executed in part; as if the defendant promiſe to pay the reſidue of a legacy in conſideration of the plaintiff having, at the defendant's requeſt, executed a general releaſe to his wife executrix. Ante, 223. 5 C. Jones, 365. 1. Roll. Ab. 13. Dyer, 172. 2. Leon. 225.

ASSUMPSIT. The plaintiff declares, Whereas *Francis Townſend* made his will, and thereby deviſed to the plaintiff three-ſcore pounds, to be paid at his age of one-and-twenty years; and made *Anne* his wife his executrix, and left aſſets to pay his debts and legacies; and that the ſaid *Anne* took the defendant to huſband, and afterwards the plaintiff came to full age; and the defendant and his wife paid to the plaintiff, in part of payment of the ſaid legacy, upon the 23d of *April*, three-and-fifty pounds, who gave to the defendant and his wife a general releaſe; that the defendant, 28. *September*, 5. *Car.* 1. in conſideration that the plaintiff, at the defendant's requeſt, had made a general releaſe to the defendant and his wife, aſſumed to the plaintiff, that if his wife did not pay the

the ſeven pounds reſidue of the ſaid legacy in her lifetime, that he would pay it after his (the ſaid defendant's) wife's death: and alledges in fact, that the defendant's wife did not pay the ſaid ſeven pounds in her life, and that he had required it of the defendant, and he had not paid it, *per quod actio accrevit.* TOWNSEND *againſt* HUNT.

Upon this declaration the defendant demurred; and it was argued at the bar by FARRER *for the plaintiff*, and by CALTHROP *for the defendant*. And he ſhewed for cauſe of his demurrer, that this promiſe, being for a conſideration paſt, is a void promiſe; and here is not a continuing conſideration, but *nudum pactum unde non oritur actio* (*a*): and compared it to the caſe in 10. *Eliz. Dyer*, 272. a. where one promiſed to one who was bail for his ſervant, to ſave him harmleſs, it was adjudged a void promiſe.

BERKLEY, *Juſtice*, for this reaſon, was of that opinion: but if it had been a conſideration continuing, as in conſideration of marrying his daughter or couſin, which is as a gift in frank-marriage, it had been good; but not here, no more than if in conſideration you gave him an horſe a year ſince he had promiſed to pay you ten pounds, which is void, becauſe paſt.

But JUSTICE JONES and MYSELF, upon the firſt motion, conceived it good; for if this promiſe had been made at the time of the releaſe made, it had been clearly a good promiſe and a good conſideration; then being made after the releaſe, foraſmuch as the releaſe is made at the defendant's requeſt (*b*), and the defendant hath the continuance of the benefit thereof, the promiſe upon this conſideration is good enough: for ſo the caſe imports in *Dyer*, 272. If the bail had been entered into *at the maſter's requeſt*, and afterwards he had made the promiſe, it had been well enough. And for this purpoſe they vouched the caſe of *Marſh v. Rainsford* (*c*); and another caſe here of *Rigges v. Bullingham* (*d*), where, in conſideration that the plaintiff, at the defendant's requeſt, had granted the next avoidance of ſuch a church, the defendant, at a day after, promiſed to pay to the plaintiff one hundred pounds. After verdict upon *non aſſumpſit*, it was moved in arreſt of judgment, FIRST, Becauſe there was no time or place mentioned when that grant was made.—*Sed non allocatur*; becauſe it was but an inducement to the action.—A SECOND EXCEPTION, Becauſe it was a conſideration paſt, and it might be twenty years before.—*Sed non allocatur*; becauſe it was made at the defendant's requeſt.

Afterwards, in *Michaelmas* Term, 11. *Car.* 1. the principal caſe being moved again, ALL THE JUSTICES, *ſeriatim*, delivered their opinions, that it was good; and it was adjudged for the plaintiff.

Plowd. 302. Cro. Eliz. 59. 194. Moor, 866. Cro. Jac. 18. Hob. 10. 1. Com. Dig. 142. 3. Salk. 96.

(*a*) 1. Roll. Ab. 11. Moor, 220. Cro. Eliz. 193. 442. 835. 3. Lev. 92. 366. Stra. 592.

(*b*) 1. Roll. Ab. 11. p. 20. 3. Lev. 366. Stra. 933. in point. 1. Com. Dig. 142.

Continuing conſideration.

(*c*) 1. Danv. 37. p. 25. 2. Leon. 111. (*d*) Cro. Eliz. 715.

The King *againſt* Sir Baſil Brook.

CASE 3.

SCIRE FACIAS. *Quare non ſatisfecit* a fine aſſeſſed upon him at the juſtice-ſeat in the Foreſt of *Dean*. The plea was, that the juſtice-ſeat was at *Gloceſter*, which is out of the Foreſt. And thereupon it was demurred, becauſe the beginning of the juſtice-ſeat was within the Foreſt, though after adjourned to *Gloceſter*.—

A *ſcire facias* will lie for a fine at the juſtice-ſeat of a foreſt, though held out of the foreſt.—1. Roll. Ab. 534. 4. Bac. Ab. 410.

THE KING *againſt* SIR BASIL BROOK.

And ALL THE COURT held it good enough, that the juſtice-ſeat being begun at a place within the Foreſt, it may be adjourned to a place out of the Foreſt, &c. Wherefore it was adjudged for the king.

See ſtatute 7. Rich. 3. c. 3.

CASE 4.

The King *againſt* Mynn.

Proceedings in the Foreſt Courts may be removed into the King's Bench.

SCIRE FACIAS, where ſuch judgment was given againſt him, he being found *a treſpaſſer*, for cutting trees within the Foreſt without licence; and the proceeding againſt him being removed by *certiorari* out of the chancery, and by *mittimus* ſent into the King's Bench, he pleading ſuch plea, and demurrer thereupon—IT WAS ADJUDGED for the king.

CASE 5.

Smith *againſt* Smith.

On judgment againſt an infant, he ſhall not be *amerced*. Ante, 161. Poſt. 421. 574.

ERROR of a judgment in *dower*. The record certified the defendant *in miſericordiâ*, and the error intended to be aſſigned was, Becauſe the defendant, being an infant, and appearing by guardian, ought not to be amerced. The defendant moved in the common pleas to have it amended, and it was amended, and made *nihil in miſericordiâ quia infans*; and upon a writ of *certiorari* this amendment was ſo certified.

5. Co. 47. 8. Co. 62. b. Co. Lit. 137. a. Cro. Jac. 628. Dyer, 338. 1. Roll. Ab. 214. 4. Com. Dig. 177.

And it was moved by GRIMSTON, that it ſhould be amended in this court, and the judgment ſhould be affirmed.

I doubted if ſuch amendment might be upon *diminution* alledged in the record againſt the record certified in point of the judgment.—But becauſe it being now certified, that the record at the firſt was miſ-certified, the Court here would not intend that it was amended after the judgment entered, but that the record in the court there (in the judgment) was well entered at the firſt, and not miſ-entered. And that being in caſe of *dower*, and after verdict, which were to be favoured, THE COURT AGREED, that ſuch *certiorari* to aid the judgment was well awarded. And the record was amended accordingly, and the judgment affirmed.

3. Lev. 344. Salk. 49. 2. Bac. Ab. 108.

CASE 6.

William Reve *againſt* Malſter and Barrow,

Hilary Term, 9. Car. 1. Roll.

A copyhold and a freehold *Borough Engliſh* are alike; both ſhall deſcend, by cuſtom, to the youngeſt ſon; and if a copyhold be ſurrendered to uſe *for life*, and the youngeſt ſon die before *that* eſtate determine, it ſhall not by the cuſtom deſcend to his next youngeſt brother, for the cuſtom only extends to youngeſt ſons. *Sed quære*, If he ſhall not have it as *heir to the father?* or, Whether the eldeſt ſon ſhall have it *as heir to the youngeſt brother?*—S. C. 1. Roll. Ab. 614. 624. 1. Jones, 631. 1. Com. Dig. 609.

TRESPASS for entering into certain lands called *Hoo-Green*. Upon not guilty pleaded, a ſpecial verdict was found, whereby it appeared, that *George Reve*, copyholder in fee of the land in queſtion, being parcel of the manor of *Hoo*, where the cuſtom is, that the land is of the nature of *Borough Engliſh*, deſcendible to the youngeſt ſon, had iſſue three ſons, *William* the plaintiff, *George*, and *Charles*, and ſurrendered that copyhold to the uſe of himſelf and *Anne* his wife, and *his* heirs; and they were admitted accordingly. Afterward *George* the father died ſeiſed of this reverſion, which deſcended, 2. *Jac.* 1. to the ſaid *Charles* his youngeſt ſon.

Anne

REEVE *against* MALSTER and BARROW.

Anne enters and enjoys it; and afterward, in 12. *Jac.* 1. *Charles* died without iſſue. Afterward *Anne*, in 6. *Car.* 1. died: *William Reve*, the eldeſt ſon, was admitted and entered. *George Reve*, the ſecond ſon, enters and claims that land, and ſurrenders to the uſe of the defendant *Malſter*, who was admitted; upon whom *William* the plaintiff entered; and he, and the other defendant as his ſervant, re-entered; whereupon this action was brought. *Et ſi ſuper totam, &c.*

4 Co. 21. Moor, 125. 4. Leon. 38. Co. Copy. 113. Dyer, 292. 1. Roll. Ab. 502. 2. Bac. Ab. 32. Co. Lit. 14. b. 1. Peere Wms. 67

This matter was argued at the bar, and after at the bench; and it was argued at the bench by JONES, *Juſtice*, and by MYSELF, *for the plaintiff*; and BERKLEY, *Juſtice*, and BRAMPSTON, *Chief Juſtice*, *for the defendant*.

1. Term Rep. 466.

The ſole queſtion was, Whether *William Reve*, ſon and heir of *George Reve*, who created this reverſion, and brother and heir of *Charles*, who had this reverſion as youngeſt ſon and heir in Borough Engliſh, or *George*, the middle ſon, ſhall have this reverſion?

FIRST, It was agreed by them all, that *George* cannot have it, as brother and heir of *Charles*, by the cuſtom, becauſe the cuſtom is only to extend to the youngeſt ſon, and not amongſt brothers, where no ſuch cuſtom is found; and without a ſpecial cuſtom found, that it ſhall deſcend to the youngeſt brother (*a*), the law will not admit it, becauſe cuſtoms ought always to be taken ſtrictly (*b*); and ſo it was reſolved in *Ballard's Caſe*, for a copyhold in *Tottenham* (*c*).

(*a*) Co. Lit. 110 b.

(*b*) 2. Lev 138. 1. Roll. Ab. 623.

SECONDLY, It was agreed by them all, that although *Charles* never was admitted, but died before admittance, it is not material, for it is all one as if he had been admitted; for he was a copyholder, and might have ſurrendered, or charged, or let, &c.

4. Leon. 242. Cro. Jac. 198.

(*c*) Tothill, 108. 1. Com. Dig. 608.

THIRDLY, They all agreed, that betwixt a copyhold in Borough Engliſh and a freehold in Borough Engliſh there is not any difference (*d*); and that if *Anne* the mother had died in the life of *Charles*, and *Charles*, ſurviving, had entered and died without iſſue, then *William* ſhould have had the land as heir of *Charles*.

(*d*) 2. Peere Wms. 63.

But the great queſtion was, this being a reverſion expectant upon an eſtate for life, and *Charles* never being ſeiſed of the lands in poſſeſſion, but dying in the life of the tenant for life without iſſue, Whether *George*, as youngeſt ſon, may claim it, or that *William*, as heir at the common law, ſhall have it?

Salk. 243. 6. Mod. 120. Ld. Raym. 1024. 2. Keble, 158.

BRAMPSTON, *Chief Juſtice*, and BERKLEY, argued ſtrongly, that *George*, the middle brother, ſhould have it, and by conſequence the defendant, who claimed under him, as if *Charles* had never been born or *in eſſe*; for there being a reverſion expectant upon an eſtate for life, and the tenant having the poſſeſſion, *George* ſhall make his title from his father, and take by deſcent from him who had the ſeiſin of the freehold, and not make any mention of him who had but the reverſion expectant upon an eſtate for life (*e*): and compared it to the caſe of a brother of the half-blood; although the eldeſt ſon ſurvive the father, yet he may claim it by deſcent from his father, when the eldeſt had not poſſeſſion and

Co. Lit. ſect. 8.

(*e*) This opinion approved by HOLT, Ld. Raym. 1024. 1. Peere Wms. 63. *Chief Juſtice*, in the Caſe of Clement v. Scudamore, Mod. Caſes, 122. Salk. 243. Co. Lit. 151. L. C. B. *Parker's Manuſcripts.*

Reve against Malster and Barrow.

died without iſſue, as 40. *Edw.* 3. *pl.* 9. and 7. *Hen.* 5. *pl.* 2. and if the father died in poſſeſſion, and the eldeſt ſon, ſurviving, died before entry, the ſecond ſon, although he were of the half-blood, ſhall have it, he claiming by deſcent from his father; and never ſhall make mention of his brother, although in ſome reſpects he was a tenant, to alien and change. But in all actions and writs where he conveys by deſcent, there ſhall not be any mention of any but of thoſe who took the eſtate and had ſeiſin, and not from others who never had ſeiſin, the law eſteeming them as if there never had been any ſuch perſons; as in *Fitz.* "*Recovery*," 212. and 8. *Co.* 88. b. *Buckmer's Caſe*; and by conſequence he may claim here as youngeſt ſon by the cuſtom, as heir in Borough Engliſh, as if *Charles* never had been, becauſe he hath it by deſcent, and in courſe of a deſcent.

1. Com. Dig. 608.

2. Bac. Ab. 30.

But againſt that Jones and Myself held, that *William*, the eldeſt brother, had the better title; and we agreed to all the caſes put of deſcents, or conveyed by deſcent at the common law. But in this caſe the youngeſt ſon hath it by cuſtom; for he being youngeſt ſon at the time of the death of his father, that makes him heir in Borough Engliſh by the cuſtom; and for this cauſe none can be ſaid to be heir in Borough Engliſh to his father ſo long as his father lives. See 6. *Co.* 22. a. *Gorge's Caſe*. And when the youngeſt ſon is heir, in whom it veſts by the cuſtom, it is an inheritance fixed in him; and the cuſtom hath its operation in him, and none may claim that after but he who is heir unto him: and therefore we held, that the youngeſt ſon who is *in eſſe* at the time of the death of his father, only ſhall have it by the cuſtom. And if a man hath iſſue two ſons, and, being ſeiſed of land in Borough Engliſh, dies ſeiſed of that land, his wife *privement enſeint* of a ſon, the ſon *in eſſe* ſhall have it by the cuſtom, and the ſon born after ſhall not diveſt him, becauſe he was not youngeſt ſon at the time of the death of his father. *Vide* 5. *Edw.* 4. *pl.* 6. 9. *Hen.* 7. *pl.* 15. 30. *Aſſ.* 47. If land veſts in an heir by reaſon of a contingency, although another heir more near comes after *in eſſe*, it ſhall never be diveſted; and he who will after claim ought to claim from him in whom the eſtate veſted (*a*). So here this reverſion, veſting in the youngeſt ſon by the cuſtom, is *quaſi* by a contingency, and he is named heir *per accidens*, as in *Ratcliff's Caſe*, 3. *Co.* 38. a. and he is *quaſi* a purchaſor of that reverſion; wherefore when he dies without iſſue, it ſhall deſcend to him who is his heir, which is the eldeſt ſon: and he is his heir to his youngeſt brother, and alſo heir to his father, who was laſt ſeiſed of the reverſion; and there is no reaſon but he ſhould have it as heir to his brother and to his father. And this caſe is not like to the caſes put, where they claim merely by the common law.

1. Roll. 624.

1. Com. Dig. 608.

3. Com. Dig. 610.

And whereas it was held by Brampston and Berkley, that *George*, the youngeſt ſon, ſhould have it as heir in Borough Engliſh, becauſe he is the youngeſt ſon when the *feme* died, and the reverſion fell in poſſeſſion:

But that was utterly denied by Jones and Myself; for he was not youngeſt ſon when his father died, and none may have it by

(*a*) See the 10. & 11. Will. 3. c. 16.

that

that cuſtom, but he who is youngeſt ſon at the time of the death of the father: for as it is ſaid, that ſuch an one *eſt primogenitus ejus filius*, and heir at the common law; ſo in Borough Engliſh, that ſuch a one *eſt minimè natus* at the time of the death of his father, and heir unto him according to that cuſtom: and he who is the middle ſon at the time of the death of his father, cannot be ſaid to be the youngeſt ſon at that time, and therefore not within the cuſtom. Wherefore, &c. (*a*).

REVE *againſt* MALSTER and BARROW.

1. Peere Will. 67. See Salk. 244. and 1. P. W. 69.

(*a*) See Clements v. Scudamore, 1. Peere Will. 63.

CASE 7.

Anonymous.

ERROR of a judgment in *Coventry*. The error aſſigned and inſiſted upon by MAYNARD was, That the verdict found 5l. for damages, and 26s. 8d. for coſts. And the Court awarded, that he ſhould recover the damages and coſts aſſeſſed by the jury; and further, that he ſhould recover 53s. 4d. *de incremento ad requiſitionem* the plaintiff; and he doth not ſay *pro miſis ſuis*, according to the uſual courſe of the precedents; and it might be the *incrementum* was *pro damnis*.—And ALL THE COURT (except BERKLEY) held, that it was well enough: for it ſhall be intended *pro miſis*, which was the laſt antecedent, and that which might lawfully be increaſed, and not *pro damnis*; which cannot be increaſed. Wherefore the judgment was affirmed.

Judgment for damages and coſts, and ſo much *de incremento*, &c. is good, without ſaying *pro miſis*.

Michaelmas

Michaelmas Term,

11. Car. 1. In the King's Bench.

Sir John Bramſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Case 1.

King *againſt* Fitch.

Trinity Term, 9. *Car.* 1. *Roll* 213.

In waſte, for ſeveral waſtes in ſeveral places entire damages may be given. Ante, 328. Poſt. 452. Roll. Ab. 569, 570 673. 3. Bulſt. 258. Dyer, 369. 10. Co. 130. 3. Lev. 324. Stra. 910. 2. Com. Dig. 625. 2. Cromp. Prac. 313. Bull. N. P. 120.

ERROR of a judgment in waſte in the common pleas; where judgment was, upon default of the defendant, that a writ of enquiry of waſte ſhould be awarded.

MAYNARD aſſigned for error, FIRST, Becauſe the waſte being aſſigned in three houſes, two gardens, &c. upon the writ of enquiry, waſte was found in the houſes and gardens, and entire damage given. And it was alledged, that ſeveral damages ought to be given for every of them, ſo that it might appear to the Court what damages were in every of them; for if it were ſmall in any of them, *viz.* under 12d. it is ſo little that the Court would not adjudge it waſte; and being aſſigned in ſeveral houſes, it ought to appear to the Court how much is the waſte of every of them by itſelf particularly. *Vide* 9. *Hen.* 6. *pl.* 67.—*Sed non allocatur:* for when the ſheriff and jury have had the view, and given damages for the waſte, it ſhall not be intended *petit* damages in any; and the uſual courſe is in all precedents to find entire damages.

In inqueſts of office there may be more or leſs than *twelve* jurors. F. N. Br. 107. Finch's Law, 484. 2. Hale, 161. Co. Lit. 155.

THE SECOND ERROR, Becauſe upon the writ of enquiry of waſte thirteen jurors were returned to be ſworn, where there ought to be but twelve: for it is not like to other writs of enquiry, where it is uſual to have more than twelve, at the ſheriff's pleaſure; for that is but a mere inqueſt of office: but here it is a verdict, and in nature of a verdict, whereof an attaint lies. *Vide* 3. *Hen.* 6. *pl.* 29. —*Et adjournatur* (*a*).

note (3). 3. Roll. Abr. 673. 2. Com. Dig. 26. 5. Com. Dig. 370.

(*a*) *Vide* Poſt. 452.

Case 2.

Acton *againſt* Symon.

Michaelmas Term, 10. *Car.* 1. *Roll* 83.

An *aſſumpſit* lies on an expreſs promiſe to pay rent, in conſideration that the plaintiff would demiſe the lands on which it is reſerved.

ASSUMPSIT. That the defendant, the twenty-fifth day of *April*, 3. *Car.* 1. in conſideration the plaintiff would demiſe to the defendant the moiety of an houſe and certain lands for three years for the rent of twenty-five pounds a-year, payable at *Michaelmas* and the *Annunciation*, aſſumed to pay the ſaid rent at the ſaid Feaſts: and alledges in fact, that *poſtea* the ſame day he demiſed the ſaid lands to the defendant *in formâ prædictâ*, and that he enjoyed the land accordingly during the three years, and had not paid his rent.

1. Com. Dig. 115. S. C. Jones, 364. S. C. 1. Roll. Abr. 8.

The

ACTON *againſt* SYMON.

The defendant pleads *a ſurrender* of the ſaid lands before any of the Feaſts for which the breach was aſſigned, and acceptance thereof. And hereupon they were at iſſue; and found for the plaintiff.

GRIMSTON now moved in arreſt of judgment, that the action lies not, becauſe it is grounded upon a perſonal promiſe in a real contract; which real contract being executed, the *aſſumpſit*, which is merely perſonal, is determined; and the rent being real, he cannot bring this action for the non-payment thereof.

But JONES, BERKLEY, and BRAMPSTON, *Chief Juſtice*, conceived it lies, for it is a collateral and abſolute promiſe; but if it had been an implied promiſe, as upon a ſale of goods, &c. this action lies not. But there being an expreſs and direct promiſe alledged, which is in a manner confeſſed by the defendant by his plea in bar, the action lies, as if he had covenanted by deed, or were obliged by an obligation to pay the rent; and ſo this promiſe is good (*a*).

Cro. Jac. 598. 668. 1. Roll. Ab. 29.

But *I* doubted thereof, becauſe it is a perſonal contract: and by the leaſe made the perſonal contract is determined; for it is in vain to have an *aſſumpſit* where he may have *debt* upon the leaſe, and thereby recover the debt and damages for the forbearance: and in this action no *gager del ley* lies; and then there is no cauſe to have this action.

GERMYN urged, that if this action were maintainable, then the defendant could not plead eviction or ſuſpenſion of the rent by entry into part of the land.

To an *aſſumpſit* on an *expreſs promiſe* to pay rent purſuant to the terms of a demiſe, the defendant may plead *eviction, &c.*

But ALL THE COURT denied it; for notwithſtanding this promiſe, it is a rent as before; and if it be determined as a rent, the promiſe for the rent is alſo diſcharged; whereupon by the ſaid three Juſtices it was adjudged for the plaintiff.

But we all agreed, that there ought to be an *expreſs promiſe* proved, if he had pleaded "*non aſſumpſit*;" and that an *implied promiſe* would not have ſerved.

On a *ſpecial aſſumpſit* for rent, the plaintiff ſhall recover all the arrears in damages. Ante, 6. 343.

BERKLEY held, that if he recovered damages to the value of the rent arrear, it may be pleaded in bar to an action of debt for the rent; but BRAMPSTON, *Chief Juſtice*, and *I* denied it.

Yelv. 84. Cro. Eliz. 57. 240. Cro. Jac. 110. 1. Sid. 279.

To *aſſumpſit*, the defendant may plead *a bond* given for the recovery, for the bond determines the contract.

BERKLEY ſaid, if one borrow money, and promiſe to enter into bond to pay it at a day to come, and promiſe that he will keep his day of payment, and afterwards he makes an obligation for the payment of this money at the day, if he fail of the payment, debt may be brought againſt him upon the obligation, and he may alſo maintain an action of the caſe upon the promiſe; but *I* denied it, becauſe the obligation determines the contract.

Clift. 199. Cro. Jac. 33. 234 2. Wilſ. 332. Cowp. 128.

(*a*) Now by 11. Geo. 2. c. 19. ſ. 14. "To obviate difficulties that may occur "where demiſes are not by deed, it is "enacted, that the landlord may recover "a reaſonable ſatisfaction for the lands, "tenements, or hereditaments held or oc"cupied in an action on the caſe for *uſe* "*and occupation* of what was ſo held or en"joyed; and if on the evidence any parol "demiſe or agreement, not by deed, whereon "a certain *rent* was reſerved, ſhall appear, it "ſhall be made uſe of as evidence of the "*quantum* of damages to be recovered."

Done.

Case 3.

Done *againſt* Smethier and Leigh.

Trinity Term, 8. Car. 1. Roll 1310.

In covenant to levy a fine, if the ſheriff be a party, the writ ſhall be directed to the coroners.

ERROR to reverſe a fine (*a*) in *Cheſter*, 2. *Car.* 1. betwixt *Smethier* and *Leigh* demandants, and *Sir Richard Done* and *Sir John Done* and *Margaret* his wife and *John Done* their ſon and heir apparent deforceants, &c.

Jones, 352. 373. 1. Roll. Ab. 797. Co. Lit. 158. 3. Mod. 248. Moor, 547. 2. Vent. 216. 4. Bac. Ab. 450. Cruiſe 19.

The error aſſigned was, Becauſe the writ of covenant was directed to the coroners, with this clauſe in the end of the writ, "Quia prædictus JOH. DONE *miles eſt vicecomes comitatûs* CESTRIÆ, *fiat executio brevis prædict. per coronator' ita quòd vicecomes non ſe intromittat*," where the writ ought to have been directed to the ſheriff, &c.

This error was divers times argued at the bar, and much inſiſted upon by CALTHROP, MAYNARD, and others, who argued at the bar *for the plaintiff* in the writ of error. And FIRST they ſaid, That if the ſheriff had been the ſole party to the fine, yet the writ ought to have been directed to him, becauſe it is but a ſummons, and the ſheriff may ſummon himſelf; alſo it is not returned that he is ſheriff and cannot ſummon himſelf; and the courſe of law is, that the writ ſhall be directed to the ſheriff, and not to any other, when it may be done without prejudice; and that the writ is abateable where it is directed to the coroners, &c. *Vide* 18. *Hen* 8. *pl.* 3. 9. *Hen.* 6. *pl.* 12. The SECOND REASON, Becauſe that the ſheriff is not the ſole party, but others are joined with him, &c.

1, Roll, 797. Pl. Com, 76, a.

And ALL THE COURT reſolved, that it was not error; for if the writ be directed to the ſheriff, and he is party, it is doubted in the Books if the ſheriff as plaintiff may execute a writ for himſelf, and as defendant may execute a writ upon himſelf; and therefore it were good, to avoid that doubt, to take a writ directed to the coroners, as well where the ſheriff is plaintiff as defendant, upon ſurmiſe thereof in chancery, at the time of ſuing the writ. And it is the general courſe to award the writ to the coroners, to avoid the doubt of delay; for if he be plaintiff and makes not ſuch ſurmiſe, the defendant peradventure will take exceptions in abatement of the writ; and ſo if he be defendant he may peradventure plead in abatement of the writ, and cauſe him to have a new writ. But when it is awarded to the coroners, if the defendant would have excepted againſt it (as peradventure he might in ſome caſes), yet when he appears and accepts thereof, and comes and levies a fine thereupon, he never afterwards ſhall aſſign for error, that the writ ought not to have been directed to the coroners; eſpecially upon this amicable writ to make aſſurance, &c. *Vide* 34. *Hen.* 6. *pl.* 29. 12. *Hen.* 4. *pl.* 24. 8. *Hen.* 6. *pl.* 28. 2. *Hen.* 6. *pl.* 12. *Fitzh. N. Br.* 98. 11. *Edw.* 4. *pl.* 7. 3. *Hen.* 6. *pl.* 2.

In a fine, the certificate of the writ may be amended by the return.

ANOTHER ERROR was aſſigned, That the writ of covenant in the certificate is, *ſi fecerit eos ſecur. &c.* where it ought to be *vos*; but upon view of the return of that writ certified from *Cheſter*, it was *vos*.—Whereupon it was awarded that the roll ſhould be amended; and the fine was affirmed.

(*a*) By 10. & 11. Will. 3. c. 14. writs of error for reverſing fines muſt be brought within twenty years after levying them, except as to thoſe under the impediments therein mentioned, who are allowed five years after the impediment removed. By 4. Ann. c. 16. ſ. 10. the action muſt be commenced within a year after claim or entry made; and it muſt be an actual entry. 3, Burr. 1897.

Downs

Downs *againſt* Hathwait.

CASE 4.

DEBT upon a bond *de quinquaginta duabus libris*. The defendant pleads "*non eſt factum*." The jury find the bond to be *quinginta duabus libris*, with a condition to pay twenty-ſix pounds, and that the defendant delivered that as his deed to the plaintiff: and if that be the deed of the defendant, as is mentioned in the declaration, they pray the diſcretion, &c.—And, upon motion, THE COURT held it to be found for the plaintiff; for "*quinginta*" is all one with "*quinquaginta*," as "*wiginta*" PRO "*viginta*." Whereupon rule was given, that judgment ſhould be entered for the plaintiff, unleſs, &c.

A variance between a bond and the declaration of "*quinginta*" inſtead of "*quinquaginta*" is immaterial.

10. Co. 133. 2. Roll. Ab. 146. Cro. Jac. 147. 208. 261. 290. Salk. 462.

338. 607. Lut. 422. Hob. 20. 119. Cro. Eliz. 896. Yelv. 193. 225. Skin. 310. 2. Vent. 106. 2. Mod. 342. Cowp. 178. 1. Term Rep. 240.

Afterward, being moved again, another exception taken, That the bond and the declaration were *John Hathwait*, and the roll is *Joaes*.—*Sed non allocatur*; but adjudged for the plaintiff (*a*).

A variance of *Joaes* inſtead of *John* is immaterial.

Cro. Jac. 203. Cowp. 229. (*a*) It was moved again, and adjudged for the plaintiff. Poſt. 418.

Needler *againſt* Symnell and his Wife.

CASE 5.

Trinity Term, 11. Car. 1. Roll

ACTION ON THE CASE FOR WORDS. Whereas the plaintiff was of good name and fame, and a citizen and freeman of *London*, and for twenty years had uſed, and yet uſeth, the trade of ſelling of CRNELL without any deceit, that the defendant's wife ſaid theſe words, "Thou art a cheater, and haſt cheated my "huſband of five hundred pounds." The defendants pleaded *quòd ipſi non ſunt inde culpabiles*; and found for the plaintiff, and damages forty pounds.

"*Quod ipſi non "ſunt. cul.*" is a good iſſue by huſband and wife, for the offence of the wife only.

S. C. Jones, 366. 1. Roll. Ab. 62. 68. Cro. Jac. 5. Cro. Eliz. 883. Hob. 126. 1. Brownl. 6. Palm. 68. 2. Saund. 307. Cro. Jac. 239. 288. Poſt. 594. 516. 1. Roll. 62. 1. Ro. Rep. 216.

And it was now moved in arreſt of judgment, FIRST, That the iſſue was not well joined; for being for words of the wife, the iſſue ought to have been *ipſa non eſt inde culpabilis*.—*Sed non allocatur*: for the huſband and wife are charged as for the wrong of the wife; ſo the iſſue, *quòd ipſi non ſunt inde culpabiles*, is well enough.

SECONDLY, It was moved, that for theſe words an action lies not; for the words do not touch him in his profeſſion as a tradeſman, nor are applied to him for cheating him in his trade; but it may be that he cozened or cheated him at dice, or by ſale of land: and to ſay that one cozened or cheated him, an action lies not, no more for a tradeſman than for any other perſon; and it hath been ſo reſolved and adjudged in *Sir William Brunker's Caſe* (*a*), and *Gorge's Caſe* (*b*).—ALL THE COURT was of that opinion, they delivering their opinions *ſeriatim*. Wherefore rule was given to enter judgment for the defendant, unleſs, &c.

(*a*) Cro. Jac. 427. (*b*) Cro. Eliz. 95. Moor, 261. Hutton, 14.

Doctor Sybthorp's Caſe.

CASE 6.

ACTION FOR WORDS. For that the defendant, at *Burton-Lazers* church, ſpake theſe words: "See, *Doctor Sybthorp* is "robbing the church:" and afterwards, at another day, ſpake of the plaintiff, "*Doctor Sybthorp* hath robbed the church" (*innuendo* the church of *Burton-Lazers*).

Maliciouſly to ſay that another "*is doing*" ſuch a thing, which if *done* would be felony, is actionable; for it ſhall be intended in the *worſt ſenſe*. S. C. Jones, 366. 1. Roll. Ab. 76.

After

Sherthorp's Case.

After verdict for the plaintiff, Bagshaw moved in arrest of judgment, that for the first words an action lies not, because he doth not charge him with an act done, but in attempting to do an act: and for the last words, that it lies not, because it doth not mention what church, nor of what thing; and it may be in taking away the lead, or such things, which are not felony (*a*), or, as the common speech is, for not paying his tithes.

Sed non allocatur: for all the Court held, that for both speeches an action lies; for it is to be intended in the worser part, being spoken maliciously to slander him, and that it was for the taking of such things as is a felonious act. And although it was objected, that robbing the church is an intention to do an act, and is not felony; and to say, that he attempting to do an act cannot be felony, and therefore no cause of action; Berkley said, that for saying such a person is robbing such a man, or ravishing such a woman, an action lies: so here. Wherefore it was adjudged for the plaintiff. *Vide Benson v. Morley* (*b*); where it was adjudged, that for these words, "Thou hast robbed the church," *innuendo* the church of *Alphage*, an action lies.

Cro. Jac. 154.

(*a*) Made felony by 4. Geo. 2. c. 32. (*b*) Cro. Jac. 153.

Case 7.

The Case of Downs and Hathwait.

Vide ante, Page 416.

A bond shall not be avoided by vicious writing or incongruity. Ante, 33. 314. 386.

S.C. Jones. 366. 2. Roll. Ab. 136. Cro. Eliz. 896. Cro. Jac. 147. Hob. 19. 4. Com. Dig. 479. 1. Term Rep. 240.

This Case was moved again. Rolle, *for the defendant*. First, There is a variance betwixt the obligation and the declaration; for the declaration is, that Johannes Hathwait *fuit obliege*; and the obligation is Joaem, without any *dash* or *prick* over it; so it cannot be the same obligation whereof he declares; and the bond is void for the insensibility; for *Joaem* is not any name.—*Sed non allocatur*; for it is the same word, and shall be intended *Johannem* abbreviated: and an obligation shall not be avoided by vicious writing or incongruity.

Secondly, He moved, that *quinginta* is not a word of any certainty, and especially it cannot be taken for *quinquaginta*, for it wants the syllable "*qua*;" and if it hath any sense, it is rather to be taken for five hundred than for fifty.—*Sed non allocatur*: for it cannot be taken for five hundred, because it is not "*centa*," which is taken for a hundred; and it hath sufficient intendment to be fifty, by the condition to pay six-and-twenty pounds. And a case was remembered, that an obligation "*septingent*" was taken for "*septuagint*," and not seven hundred, nor void: so here. Wherefore it was adjudged for the plaintiff.

Case 8.

Baker and Unica his Wife *against* Brereman.

Easter Term, 11. *Car.* 1. *Roll* 152.

In an action for stopping a way, the plaintiff must prescribe in him who has the inheritance; for an allegation that all occupiers of a certain close ought to have a way for them and their servants, &c. is not sufficient; but inhabitants may prescribe for an easement, &c. in the soil of another. Ante, 326.

Action on the case. Whereas the wife, before marriage, was possessed of a lease for years of a close in *St. Martin's*, in which close a stable was formerly erected, and now an house there built; and that the defendant was occupier of another close called The Yard, in the said parish of *St. Martin's*, near adjoining to the plaintiff's close; and that within the said parish there is, and time whereof, &c. was, a custom, that all the occupiers of such

a close

BAKER *againſt* BERREMAN.

a cloſe of the plaintiff's, from time whereof the memory of man is not to the contrary, *habuerunt et habere conſueverunt*, for them and their ſervants, *quandam viam tam pedeſtrem quàm equeſtrem* at all times of the year for all carts and carriages from the ſaid cloſe of the plaintiff's *in vel ultra* the cloſe called THE YARD, *ad vel in* a place uſually called THE LEYSTALL in *St. Martin*'s aforeſaid; *et ſic retrorſum* from the ſaid place called THE LEYSTALL, *et in ultra* the ſaid cloſe called THE YARD, *uſque ad* the cloſe of the plaintiff. And the ſaid *Unica* his wife ſo being poſſeſſed, and having the occupation of the ſaid cloſe, that the defendant, to hinder her of her way, and totally to exclude her, ſuch a day and year erected a building upon the cloſe called THE YARD, *ex tranſverſo viæ prædictæ*, that ſhe might not have nor uſe the ſaid way; and that afterward ſhe married the plaintiff *Baker*, and that they, after the marriage, could not uſe the ſaid way, to their damage of forty pounds.

Jones, 267. 367. 3. Lev. 386. Co. Lit. 113. b. 4. Co. 31. Cro. Jac. 152. 446. 665. 2. Leon. 44. 6. Co. 61. 5. Co. 99. Godb. 54. Fort. 340. 3. Burr. 1402. 4. Com. Dig. 471. 3. Term Rep. 147.

The defendant pleads not guilty; and found againſt him. HUTCHINGS now moved in arreſt of judgment, FIRST, That ſuch a cuſtom within a pariſh alledged for an occupier of ſuch a cloſe to have a way, &c. is not good, but he ought to preſcribe in him who hath the inheritance; and that a cuſtom in a pariſh cannot be well applied to a cloſe in the pariſh.—AND ALL THE COURT was of that opinion. 21. *Eliz. Dyer*, 363. 6. *Co.* 60. b.

ROLLE alledged, that he cannot otherwiſe preſcribe, becauſe one man was once owner of the inheritance of both cloſes; and unity may not deſtroy the way; but that it is revived by the diſſeverance, as 21. *Edw.* 3. *pl.* 2.

IT WAS ANSWERED thereto, that it ought to have been ſo ſpecially ſhewn, which doth not appear here; and peradventure it will not ſerve in caſe of a way: but in caſe of neceſſity, as a watercourſe betwixt two houſes, or peradventure incloſure, or ſuch things which are of neceſſity, there he may ſo preſcribe, and the party ought to except them in his conveyance. *Vide* 11. *Hen.* 7. *pl.* 25.

And ALL THE JUSTICES held, that inhabitants may alledge preſcription for a way to a church or market, which are of neceſſity, and in matter of diſcharge, as in *modo decimandi*, or to be quit of toll; but not in matter of profit or charge in another ſoil, as *Gateway's Caſe* (*a*), 8. *Edw.* 4. *pl.* 5. for fiſhermen to dry their nets for the public benefit or for eaſement, as 15. *Edw.* 4. *pl.* 29. & 18. *Edw.* 4. *pl.* 3. (*b*)

(*a*) Cro. Jac. 152. Cro. Eliz. 180. 2. Roll. Ab. 264. Carth. 191.

Show. 257. 1. Lev. 176. 2. Lev. 253. 3. Lev. 386. Hob. 86. 118. Co. Lit. 110. b.

THE SECOND EXCEPTION was, Becauſe the wife joined with the huſband in the action for the ſtopping during the coverture, which ought not to be.—*Sed non allocatur*; becauſe the wrong was done to the wife, and the huſband had it in right of his wife.

In an action for ſtopping a way to the wife's cloſe previous to the marriage, the huſband ought to join.

But for the firſt exception it was adjudged for the defendant.

Poſt. 348.—Cro. Eliz. 96. 459. 608. 613. 1. Com. Dig. 571. 575. See S. C. cited, Bulſt. 110. *Sed vide* Ld. Ray. 443. 1. Stra. 61. 229. 2. Stra. 726. 977. 12 Mod. 294. 3. Term Rep. 627. 2. Mod. 217. Dougl. 329.

(*b*) 6. Co. 61.

Hutchman

Case 9.

Hutchman *against* Porter.

In an action for a malicious profecution "*acquietatus*" is ſufficient, without ſaying "*inde.*" *Vide* ante, 286. 315. Cro. Jac. 131. 230. Yelv. 161. 1. Com. Dig. 161. See 1. Hawk. P. C. ch. 72. ſ. 4.

THIS caſe was now moved again, and THE COURT agreed that the judgment was good; for it cannot be intended, that he was acquitted of any other matter; therefore he was acquitted *inde*, and it is certain enough. The writ in *Fitzherbert* (*a*) of conſpiracy is *acquietatus*, and he doth not ſay *inde*; and the precedents are both ways. The two precedents in the *Old Entries*, 123. is *acquietatus*, omitting *inde*; and although the other precedents, which are *acquietatus inde*, are the ſureſt way, that doth not prove but where *inde* is omitted it is good enough. Whereupon all THE FOUR JUSTICES reſolved, that the judgment was good, and affirmed it accordingly.

(*a*) Natura Brevium, p. 115.

Case 10.

Spencer *against* Medburne and his Wife.

In an action for theſe words, "Tell my land-"lord he is a "thief," it muſt be *averred* that the plaintiff *is* the landlord ſpoken of. Ante, 177. Poſt. 492. 2. Roll. Ab. 84.

ACTION FOR WORDS. Whereas the defendant's wife, having communication with *J. S.* of the plaintiff, and intending to deprive him of his good name and fame, and draw him into peril of his life, ſuch a day and year ſpake of the plaintiff *hæc Anglicana verba*: "Go tell my landlord" (*innuendo* the plaintiff) "he is a "thief, and I will cauſe him" (*innuendo* the plaintiff) "to be "hanged;" the defendants pleaded not guilty; and it was found againſt them.

And now FARRER, *for the defendants*, moved in arreſt of judgment, Becauſe it is not alledged nor averred, that the plaintiff was her landlord, and that the *innuendo* will not help it.

But TAYLOR, *for the plaintiff*, argued, Foraſmuch as it is laid, that communication was by the defendant's wife *of* the plaintiff, and upon that communication it is alledged, that the wife ſaid *de eodem querente* the ſaid words, "Go tell my landlord" (*innuendo* the plaintiff), it is a certain deſcription that they were ſpoken *of* the plaintiff; and when the jury hath found them guilty, it proves that the words were ſpoken of the plaintiff, who was her landlord, otherwiſe it could not be found to be ſpoken of him.

And JUSTICE JONES and MYSELF were of this opinion; but BERKLEY, and BRAMPSTON, *Chief Juſtice*, doubted thereof; for if the declaration in itſelf is not certain by an *innuendo* to be ſpoken of the plaintiff, the verdict can never aid it; and it is not here ſhewn that the plaintiff was her landlord, and ſhe might have more landlords, and *non conſtat* of whom ſhe ſpake. Wherefore *Curia adviſare vult.*—And after it was adviſed, to avoid further queſtion, that the plaintiff ſhould relinquiſh this action, and amend this fault in the ſecond. And it was ordered by conſent (*b*).

(*b*) *Sed vide* 2. Roll. Ab. 84. where it is ſaid, that in *Hilary Term*, 11. *Car.* 1. judgment was given in this caſe againſt the plaintiff, *quod nil capiat per billam.*

Case 11.

Price *against* Packhurſt and Others.

Hilary Term, 10. *Car.* 1. *Roll* 716.

In debt on bond by ſix executors, *three* of whom were ſummoned and ſevered, on verdict for the plaintiffs, the three who proſecuted may ſign judgment without naming the others.—2. Roll. Ab. 98. Dyer, 319. Weſt. Off. Ex. 104.

ERROR of a judgment in the common pleas. Whereas an action of debt was brought by ſix executors named in the writ,

and

and after three of them being ſummoned and ſevered, the three others bring debt upon an obligation made to the teſtator. The defendant pleaded, *non eſt factum*; and found againſt him, and judgment for the plaintiff.

PRICE *againſt* PACKHURST and OTHERS.

GERMYN now aſſigned for error, That there is not any mention therein of thoſe which ſevered, for they, being always executors, ought to be named in the judgment. And it was commanded, that they ſhould ſearch the precedents in the common pleas, to ſee what the courſe was there, Whether, upon ſummons and ſeverance, judgment only ſhall be for thoſe which proſecuted? And it was certified by the three prothonotaries, that the courſe was ſo.

And THE COURT, *abſente* BRAMPSTON, were of opinion, that it is a good courſe, and no cauſe of error: for the executors who are ſevered peradventure never proved the teſtament, and it may be never will prove it or adminiſter; therefore when they are named in the writ, and will not join, it is reaſon judgment ſhall be only for thoſe who proſecuted, without naming thoſe who are ſevered. Whereupon rule was given, that judgment ſhould be affirmed, unleſs, &c.

Smith *againſt* Smith.

CASE 12.

ERROR of a judgment in the common pleas. The error aſſigned was, Becauſe the *venire facias* was returned by *Sir Richard Saltingſton*, ſheriff of *Eſſex*, *in Craſtino Martini*, *nono Caroli*; and that then *in Craſtino Martini*, *nono Caroli*, the ſaid *Sir Richard Saltingſton* was not ſheriff, but one *Henry Smith*. The defendant in the writ of error ſaith, that *Sir Richard Saltingſton* was made ſheriff of *Eſſex* before the return of the ſaid writ, *viz. decimo Novembris*, *nono Caroli*, by the king's patent dated *decimo Novembris*, *prout patet de recordo*. Upon "*nul tiel record*" pleaded at the day, he procured in court the letters patents whereby he was made ſheriff. And it was moved by MAYNARD, that this ought to be tried *per pais*, whether he were ſheriff at ſuch a day, and not by *the record* of the patent; for he might be diſcharged before the day.—*Sed non allocatur*; for it ſhall not be intended, unleſs it were by pleading ſhewn to the Court. Wherefore the judgment was affirmed.

On an error in fact, as that *A.* on the return of the *venire* was not ſheriff, *in nullo eſt erratum* is no confeſſion of it. Ante, 245. 2. Roll. Ab. 575. 758. 9. Co. 31. Cro. Jac. 12. 29. 521. Raym. 231. 3. Bac. Ab. 275.

Horn *againſt* Barbar.

CASE 13.

DEBT upon an obligation. The defendant demands *oyer* of the condition, which was, That if he paid the rent reſerved upon the leaſe of a mill and certain lands during the term of thirteen years, at the Feaſts mentioned within the leaſe, or within ten days, or within ſix months, according to a latter agreement betwixt them, then the obligation ſhould be void. The defendant pleaded the indenture *verbatim*, which was of the leaſe of a mill and certain lands mentioned therein, reſerving the rent of forty pounds a-year at the four uſual Feaſts, or within ten days after: and he pleaded, that he hath performed all the covenants, payments, and agree-

To covenants in the diſjunctive, the defendant cannot plead payment generally, but muſt ſpecially ſhew which of them he has performed. Ante, 76. Co. Lit. 303. Cro. Eliz. 232.

1. Roll. Ab. 460. Cro. Jac. 460. 1. Lutw. 581. Palm. 70. Savil, 120. 1. Leon. 311. 1. Lev. 303. Salk. 498. Cowper, 578. Dougl. 685.

HORN *against* BARBAR.

ments contained in the indenture, *secundum formam et effectum indenturæ et conditionis prædict.* And upon this plea the plaintiff demurred.

And KEELING, *for the plaintiff*, shewed for cause, For that the condition is in the disjunctive, *viz.* "at the four Feasts, *or* within "ten days after every Feast, *or* within six months" (according to the agreement), and therefore he cannot plead payment generally; for he hath election to pay it at which of those days he will.

I was of opinion, that the defendant might plead payment generally; but JONES and BERKLEY against it, Because the obligation refers to one of the three times, *viz.* "the four Feasts, *or* "within ten days after every of them, *or* within six months," where he hath election upon which of those days he will pay: and he pleading that he hath performed the covenants, payments, and agreements, it is no plea to this condition. Wherefore they gave rule, *absente* BRAMPSTON, that judgment should be given for the plaintiff, unless, &c.: and afterwards judgment was entered accordingly. *Vide* 21. *Edw.* 4. *pl.* 12. *et* 44. *Keilway*, 95. 38. *Hen.* 6. *pl.* 26. 8. *Co.* 133. *b.* *Co. Lit.* 303. *b.* 5. *Hen.* 7. *pl.* 9. 22. *Edw.* 4. *pl.* 44.

CASE 14.

Sydowne *against* Holme.

In prohibition to a suit for tithes of abbey land, if it appear that the abbot was exempted from the payment of them at the time of the dissolution, it shall be intended an exemption by reason of *personal privilege*, and not on account of any *composition real*.

S. C. Jones, 368.
S. C. 1. Roll. Ab. 654.
2. Co. 47. 49.
11. Co. 10. 14.
2. Inst. 653.
Hob. 298. 306.
Cro. Eliz. 206.
Cro. Jac. 452.
Hard. 315.
3. Com. Dig. 86.
5. Bac. Ab. 86.
1. Wilf. 573.

PROHIBITION; surmising, That the *Prior of Bristol* was seised in fee of such land parcel of his priory, and that he and all his predecessors time whereof, &c. until the dissolution, held the said lands, being parcel of the demesnes of the said priory, discharged and acquitted from the payment of tithes, for his fermors and tenants for life or years of the said lands, &c.; and that the said priory was dissolved by the 27. *Hen.* 8. c. 28.; and that the said king was seised in fee of the said lands, &c.; and shews the statute of 32. *Hen.* 8. c. 13. "that none shall be sued for tithes who were "discharged by the laws and statutes of the realm," and the statute of 2. *Edw.* 6. c. 13.: and that king *Henry* the eighth died seised of the said lands, and so conveys it by mean conveyance to *Edward Bartell*, and to the plaintiff, as his tenant for years; and that the parson of *Bristol* sued him for tithes.

Upon that prohibition the defendant demurred in law; and after arguments at the bar, it was argued at the bench.

THE FIRST QUESTION was upon this discharge being shewn to be time whereof, &c. in a spiritual person, *viz.* the prior, Whether this privilege thereof be determined by the dissolution of the priory, or still remains, and may be in the king and his patentee, without the aid of the 27. *Hen.* 8. c. 28. and 31. *Hen.* 8. c. 13.?

And *I* argued, that in regard it was discharged time whereof, &c. in a spiritual person, *viz.* the prior and convent, who were capable to have or to be discharged of tithes, it being a privilege vested in them before the Council of *Lateran* (which was before any parochial right), it may by intendment be by composition real; and then it shall go with the land, as 8. *Edw.* 4. *pl.* 11. and *F. N. B.* 41. g. that

any

any lay-perſon may have a compoſition, and thereupon may have a prohibition, much more a ſpiritual perſon may have it, by this means, &c. and it ſhall go with the land. *Vide* 7. *Edw.* 3. *pl.* 3. 10. *Hen.* 7. *pl.* 18. that a ſpiritual perſon may make ſuch a preſcription; and then being a preſcription, fixed in a ſpiritual perſon by the diſſolution, it comes to the king, being *perſona mixta*, and from him to his patentee, as *Bp. Wincheſter's Caſe* (*a*), and *Priddle v. Napper* (*b*). SYDOWR *againſt* HOLME.

But BRAMPSTON, JONES, and BERKLEY argued to the contrary; yet they agreed, that it ſhall be intended that ſuch diſcharge was by compoſition real, and ſhall go with the land, as the caſe put of a common perſon, which is, that a lay-perſon ſhall have advantage of a real compoſition, if he can ſhew it: but becauſe a ſpiritual perſon may have divers cauſes of privileges, by grant as well as by compoſition, and that in divers manners, it ſhall be intended the moſt general courſe; which is a perſonal diſcharge, which determines with their corporation, as in 3. *Edw.* 3. *pl.* 11. And in favour of the church it ſhall be intended, that it was rather by grant of privilege than by any real compoſition, and that the tithes are due to the parſon, and ſhall not be taken from him, unleſs that the diſcharge continue; which is not here ſhewn. Hob. 309. Hob. 42.

THE SECOND MAIN QUESTION was, Admitting that this diſcharge is by privilege granted to the priory, which being one of the inferior abbeys, came to the king by the 27. *Hen.* 8. c. 28. being out of the value of 200l. *per annum*, Whether this privilege be not merely determined; or, whether it is not revived by the 27. *Hen.* 8. c. 28. and 31. *Hen.* 8. c. 13.? Lands appurtenant to religious houſes, or to abbeys, given to the king on the diſſolution of the leſſer abbeys under 200l. a-year, by the 27. *Hen.* 8 c. 28. are not exempted from the payment of tithes; for the privilege is not revived by 31. *Hen.* 8. c. 13.

And in this point *I* argued, that it is aided by the 27. *Hen.* 8. c. 28. becauſe that gives the poſſeſſion of the abbeys to the king, in as ample and large manner as the abbot had them at the time of the diſſolution; and it was diſcharged at the time of the diſſolution: and if it be not aided by the 27. *Hen.* 8. c. 28. yet it is to be aided by the 31. *Hen.* 8. c. 13. by the general clauſe; which is, that the king and his patentees of any monaſteries, &c. ſhall have and enjoy the ſame, diſcharged of the payment of tithes, &c. as the late abbot, &c. had, held, and enjoyed, &c. Jones, 3. 185. 370. Cro. Jac. 608. 2. Co. 46. Moor, 913. Bunb. 122.

And whereas it hath been objected, that this ſtatute extends only to abbeys which came to the king after the fourth of *February* 27. *Hen.* 8. c. 28. but this abbey came to the king the fourth of *February* 27. *Hen.* 8. c. 28. and ſo excluded out of this ſtatute; *I* anſwered thereto, That this ſtatute extends to abbeys ſurrendered, relinquiſhed, renounced, or given up to the king after the fourth of *February* 27. *Hen.* 8. c. 28.; and that is intended to extend to all abbeys which are given by the 27. *Hen.* 8. c. 28.: for although it hath not relation to the fourth of *February* 27. *Hen.* 8. c. 28. yet that is but a foreign ſurmiſe by ſuch relations to prejudice the king; as it is 3. *Co.* 29. a. relations are but fictions, which ſhall not prejudice the king by ſuch conſtructions: and in *rei veritate* all the ſaid abbeys were ſurrendered or relinquiſhed after the fourth of *February* 27. *Hen.* 8. c. 28. or during that parliament: and the expoſition hath always been, that this clauſe extends as well to abbeys

(*a*) 2. Co. 44, 45. (*b*) 11. Co. 12.

Sydownt *against* Holme.

which came after the ſtatute of 27. *Hen.* 8. c. 28. as to the ſuperior abbeys; and never any queſtion made in theſe times, or in ſixty years after the making of the ſaid ſtatute: and therefore the caſes of ——— *v. Haydnt* (*a*), *Cogall v. Fairfax* (*b*), and *Smith v. Patchſon* (*c*), were cited, where prohibitions were granted upon ſurmiſe, that the lands came to the king by the 27. *Hen.* 8. c. 28. and that in *Berly v. Walter* (*d*), a prohibition upon the ſurmiſe for this land was granted; where it being in queſtion, Whether where continual uſage had been, that as well for inferior abbeys given to the king by the 27. *Hen.* 8. c. 28. as to abbeys which came after, and held their lands diſcharged, ſuch prohibitions ſhould be granted? I HELD it to be an equal miſchief, as well for the one as for the other, and that the ſtatute extends equal remedy; and ſo the expoſition hath been always taken by the practice.

Cro. Jac. 608. 2. Co. 49.

But BRAMPSTON, *Chief Juſtice*, JONES, and BERKLEY argued to the contrary, that the 27. *Hen.* 8. c. 28. doth not preſerve or revive this privilege, becauſe there are not any words that it ſhall be diſcharged as the abbot held it, but that the king ſhall have it, in as ample manner and form as the abbots held it; and general words will never preſerve the privilege and immunities which were determined, unleſs by ſpecial ſtatute they be revived: and the ſtatute of 31. *Hen.* 8. c. 13. doth not extend to them; for all the ſcope of the ſaid ſtatute is only to extend to abbeys which came to the king after the fourth of *February* 27. *Hen.* 8.: and all abbeys which came to the king by the ſtatute of 27. *Hen.* 8. c. 28. came to him the fourth of *February* 27. *Hen.* 8.; and to thoſe the ſtatute of 31. *Hen.* 8. c. 13. doth not intend to extend; for in every branch are mentioned only the abbeys, &c. which came to the king after 27. *Hen.* 8. And although this clauſe to be diſcharged of tithes, in the body of the ſaid clauſe, is "any monaſteries, &c." yet it is after the "ſaid late "abbots, &c.;" and abbots are not mentioned before in that clauſe; and therefore it ought to be expounded and coupled with the clauſes before, which mention and intend only what came to the king after the fourth of *February* 27. *Hen.* 8. and doth not extend to abbeys which came to the king the fourth of *February* 27. *Hen.* 8.

Hob. 111. 4. Inſt. 25.

And JONES ſaid, Although it is no ſtatute until the end of the ſeſſions when the king aſſents, yet when there hath been a ſeſſion, it ſhall have ſuch relation to the firſt day of the ſeſſions, that they veſt actually in the king the ſaid fourth day of *February* 27. *Hen.* 8.: that the king ſhall have the rents incurred after the firſt day, and before the laſt day; and if they be paid in the interim to the abbot, they ſhall be paid again to the king.

Hob. 309. 10.

JONES and BRAMPSTON relied upon the judgment in *Gerrard v. Wright* (*e*), where it was held, upon ſolemn argument, by HOBART, WINCH, and HUTTON, *Juſtices*, that the 31. *Hen.* 8. c. 13. doth not extend to abbeys which came to the king by the 27. *Hen.* 8. c. 28.; and the caſe of *Whitton v. Weſton* (*f*), for the poſſeſſions of the abbey of *St. John's* of *Jeruſalem*, where the queſtion being,

(*a*) 7. Eliz. Roll 245. in B. R.
(*b*) Eaſter Term, 27. Eliz. Roll 328. in B. R.
(*c*) Eaſter Term, 37. Eliz.
(*d*) 40. Eliz. Roll 679.
(*e*) 18. Jac. 1. in C. B. Cro. Jac. 607. Hob. 306. 1. Jones, 2.
(*f*) In B. R. 4 Car. 1. Litch. 89. 1. Jones, 182. Bridg. 31. Godb. 391. Bendloe, 168. 185. Winch's Entries, 342.

Whether

Whether the ſaid abbey came to the king by the ſpecial act of 32. *Hen.* 8. c. 13.? all the four Juſtices agreed, that the caſe of *Gerrard v. Wright* was good law, that the abbeys which came to the king by the 27. *Hen.* 8. c. 28. were not within the privilege of 31. *Hen.* 8. c. 13. nor to have the benefit of that ſtatute. SYDOWNE *againſt* HOLME. Hob. 309. 2. Levinz. 185.

And BERKLEY, *Juſtice*, inſiſted much that this privilege to be diſcharged of tithes, being a mere perſonal privilege, was determined by the diſſolution of the abbeys, and tied only to their bodies and perſons, nor can be revived without ſpecial words, which are not in the 27. *Hen* 8. c. 28.: and that although the 31. *Hen.* 8. c. 13. extends to the ſaid abbeys ſuppreſſed by the 27. *Hen.* 8. c. 28. yet there is a ſaving in the ſaid 31. *Hen.* 8. c. 13. of all rights and intereſts beſides, to the donors, abbots, &c.

Wherefore for the reaſons before, but principally for that the abbey diſſolved appeared to be ſuppreſſed by the ſtatute of 27. *Hen.* 8. c. 28. by the opinion of the ſaid three Juſtices it was adjudged for the defendant; and *conſultation* awarded.

Smith *againſt* Smith. CASE 15.

Michaelmas Term, 10. *Car.* 1. *Roll* 142.

ERROR of a judgment in FORMEDON *in remainder* in the common pleas; where the judgment being for the demandant, and the judgment in this court affirmed;

No coſts can be allowed by 3. *Hen.* 7. c. 10. on judgment for the demandant in FORMEDON affirmed on error by the tenant. Ante, 421.

WHITFEILD, *Serjeant*, moved to have coſts aſſeſſed to the defendant in the writ of error, becauſe this writ was brought before execution, and thereby the execution delayed according to the ſtatute of 3. *Hen.* 7. c. 10.

But IT WAS RESOLVED, that foraſmuch as there were no coſts nor damages recovered or allowed in the firſt action, ſo that no execution is delayed, but only for the land, no coſts are allowable by that ſtatute. Whereupon it was ruled accordingly.

R. 93. 704. Vent. 88. Lev. 146. Ray. 134. And. 113. Strange, 1084. Cro. Eliz. 617. 659. 2. Com. Dig. 555. Dougl. 560. 709. 752. 2. Term Rep. 78.

William Byrte *againſt* Manning. CASE 16.

DEBT upon an obligation, conditioned for performance of covenants. The defendant demands *oyer* of the condition, and pleads performance. The covenants were, that *Thomas Byrte*, ſon of *William Byrte*, ſhould eſpouſe *Anne* daughter of the ſaid *Manning*: and in conſideration of this marriage, *Manning* covenanted to pay 300l.; and *William Byrte* covenanted to aſſure ſuch lands to the ſaid *Thomas* and *Anne* for her jointure. And there were other covenants for the value thereof and quiet enjoyment: and amongſt others, *Manning* covenants, that "he will procure the "ſaid *Thomas Byrte* to be preſented, admitted, inſtituted, and in-"ducted into ſuch a benefice upon the next avoidance of the ſaid "church." The breach aſſigned was, for not performance of the ſaid covenant of procuring him to be admitted, inſtituted, &c.

A covenant to procure another to be preſented, &c. to a benefice upon the next avoidance, in conſideration of marriage, is ſimoniacal and void.

Cro. Eliz. 788. Cro. Jac. 533. 2. Bl. Rep. 1053. 4. Term Rep. 78. 359.

BYRTE *againſt* MANNING.

And upon this breach aſſigned the defendant demurred, Becauſe this covenant is againſt law, being a ſimoniacal agreement; and a bond for performance thereof is not good.

Ante, 361. 1. Lutw. 346.

But ALL THE COURT held, that if it had appeared to have been, that in conſideration of the marriage of his ſon, &c. he would procure him to be "preſented, admitted, inſtituted, and inducted into "ſuch a church," that had been a ſimoniacal contract, and had avoided the obligation. But here this covenant is not in conſideration of the ſaid former covenants, nor depending upon them, but it is a mere diſtinct covenant by itſelf, and independant upon the former: and without ſpecial averment or ſhewing that it was a ſimoniacal contract, it ſhall not be ſo intended; but it may be a covenant upon good conſideration. Wherefore it was adjudged for the plaintiff.

Vide 12. Ann. c. 12.

CASE 17.

Piffin *againſt* Fenton.

After iſſue joined in an action againſt two defendants, if one of them die the writ ſhall not abate.

ERROR of a judgment in the common pleas. The error aſſigned was, Becauſe the action was brought againſt two, and iſſue joined by two defendants; and after iſſue joined, one of the defendants died, notwithſtanding there was a *venire facias* awarded to try the iſſue betwixt the plaintiff and the ſaid two defendants: and the *venire facias* and *habeas corpora* and the iſſue found mentions, that it was betwixt the plaintiff and two defendants.

1. Roll. Ab. 756. 767. S. C. Jones, 367. Hard. 151. 164. Style, 269. 3. Mod. 249. Shower, 186. Salk. 8. Ld. Ray. 1415. 3. Bac. Ab. 275.

And although it be ſurmiſed that he died before judgment, ſo no judgment is to be given againſt him, yet he ought to have ſurmiſed it before the iſſue tried; and therefore HENDEN, *Serjeant*, very much urged it to be an error.

But it was reſolved by ALL THE COURT, that ſuch ſurmiſe needs not to be in *judicial proceſs* to alter it; and therefore, although a *venire facias* iſſued againſt a dead perſon, yet one of the defendants being alive is ſufficient, and no cauſe of error. Whereupon the judgment was affirmed. *Vide* 3. *Hen.* 7. and 4. *Hen.* 7. *pl.* 7. for this point.

See 17. Car. 2. c. 8. and 8. & 9. Will. 3. c. 7. ſ. 6.

CASE 18.

Digbie *againſt* White.

Variance in pleading a releaſe. Poſt. 518. 574. Dyer, 307. Co. Lit. 292. Cowp. 178.

DEBT upon an obligation of twenty pounds, dated 24th *June*, 9. *Car.* 1. The defendant pleaded, that the plaintiff 22d *February*, *decimo Caroli*, releaſed to him all actions and demands which he had, &c. The plaintiff demands *oyer* of the releaſe, which was a releaſe of all actions to the 14th of *January*, before the date of the releaſe; ſo it is not a releaſe of all actions until the day of the releaſe.—And for this miſpriſion the plea WAS ADJUDGED ill; and the plaintiff had judgment.

Stone

Stone *againſt* Newman.

CASE 19.

Eaſter Term, 7. Car. 1. Roll 115.— In the Exchequer Chamber.

REPLEVIN. UPON DEMURRER *in the King's bench* the caſe was, *Sir Thomas Wyat* was tenant in tail to him and his heirs males of his body, of the gift of KING HENRY THE EIGHTH, reverſion to the king in fee; and he being ſo ſeiſed, he inſeoffed thereof *George Moulton* and his heirs the 35. *Hen.* 8. to the uſe of him and his heirs. *Sir Thomas* had iſſue *George Wyat*, who had iſſue *Sir Francis Wyat*, in whoſe right the defendant diſtrained for *damage feſant*, and made conuſance.

The plaintiff ſhews, that the ſaid *Sir Thomas Wyat*, who made this feoffment, in 1. *Mary* was attainted of treaſon and executed. And this attainder was the ſame year confirmed by ſpecial act of parliament; and by ſpecial words, that he ſhould loſe and forfeit all his lands and tenements; and that they ſhould be veſted in the queen and her ſucceſſors without office.

Upon all this matter diſcloſed in pleading, the queſtion was, Whether after this feoffment *Sir Thomas Wyat* had any eſtate or right remaining in him, which is not forfeited and given to the queen by this attainder and act of parliament? for if it be forfeited, the plaintiff who claims under the queen's patent is in, and hath good title, and judgment ought to be given for him; but otherwiſe, judgment ought to be given for the defendant, who claims under *Sir Francis Wyat*, the iſſue in tail.

And after divers arguments in the king's bench at the bar, although there was not any variety of opinions of the Juſtices of the king's bench diſcovered, yet becauſe it was a caſe ſo long controverted, and the ſame caſe in ſubſtance which was reported by MR. PLOWDEN in *Walſingham's Caſe* adjudged in the exchequer, and afterward in the common pleas to the contrary in *Auſtin's Caſe*, the Court adjourned it into the exchequer chamber to be argued before the Juſtices and Barons of the exchequer.

And after divers arguments at the bar, it was argued ſolemnly in the exchequer chamber by all the Juſtices and Barons of the exchequer, except RICHARDSON, *Chief Juſtice*, who died whilſt the argument was depending, and BRAMPSTON made *Chief Juſtice*: and it was argued by RICHARD WESTON, *Puiſne Baron* of the exchequer, and by SIR FRANCIS CRAWLEY, *Puiſne Juſtice* of the common pleas, the firſt day, *for the plaintiff*; and upon the ſecond day by SIR ROBERT BERKLEY, *Puiſne Juſtice* of the king's bench, and SIR GEORGE VERNON, *Juſtice* of the common pleas, *for the plaintiff*; and afterwards upon a third day by SIR THOMAS TREVOR, *Baron* of the exchequer, *for the plaintiff*, and by MYSELF, *for the defendant*; and after, upon a fourth day, by JONES and HUTTON, *Juſtices, for the defendant*; and after, upon another day, by BARON DENHAM, *for the plaintiff*; and at another day, by SIR HUMPHRY DAVENPORT, *for the plaintiff*; and after, upon another day in this Term, by SIR JOHN FINCH, *Chief Juſtice* of the common pleas, *for the defendant* (but *I* being ſick at the time of his argument did not hear it). BRAMPSTON, *Chief Juſtice*, did not argue, becauſe he was made Chief Juſtice after the argument begun.

If tenant in tail of the gift of the crown make a feoffment in fee, and is afterwards attainted of high-treaſon, the right of the intail is *forfeited*; for it cannot be *diſcontinued*, becauſe the reverſion always remains in the Crown; and though it be put in *abeyance* by the feoffment, as to any benefit which the feoffor could have claimed from it, yet ſince it is not turned to a right of action, but (if there had been no attainder) would have continued in him for the time, it ſhall likewiſe continue in him for the benefit of the Crown. Poſt. 460.

Plowd 547 553. Co. Lit. 221. 335. 345. Hob. 343. 2. Roll. Rep. 305. 1. Hale, 243. 2. Hawk. P. C. 642. Co. Lit. 373. note (2). 3. Term Rep. 734.

STONE *against* NEWMAN.

THE CHIEF BARON, and other the Juſtices and Barons which argued on the plaintiff's part, much inſiſted upon the argument and reaſons given by *Sanders* in *Walſingham's Caſe* (*a*).

Co. Lit. 335. a. Pl. Com. 561.

FIRST, Becauſe it being a feoffment by tenant in tail of the gift of the king (the reverſion remaining in the king at the time of the feoffment), there is no diſcontinuance of the eſtate tail: for it cannot diſcontinue the reverſion in the king; and therefore the eſtate tail remained in him at the time of the attainder; and the forfeiture thereof veſted in the king by the ſtatute of 26. *Hen.* 8. c. 13.

Hob. 343. 3. Co. 2. 1. Leon. 270. Hob. 340. Cro. Eliz. 380. 2. Hawk. P. C. 642. Pl. Com. 561. a.

NOTE, They all agreed, that if tenant in tail of a common perſon make a feoffment, where no reverſion is to the king, it is a diſcontinuance; and if he be attainted of treaſon, there is no forfeiture to the king, as 3. *Co.* 2. b. *Marquis of Wincheſter's Caſe* is.

SECONDLY, That if the eſtate tail be not in him to be forfeited, yet the right of the intail remains, which is forfeited and given to the king by the ſtatute of 33. *Hen.* 8. c. 20. or by the private act made in the firſt year of queen *Mary*, which gives all eſtates and rights, &c. And although that a feoffment gives all eſtates, intereſts, and rights, in caſe where tenant in fee makes a feoffment, yet it is not ſo in caſe of a feoffment made by tenant in tail, becauſe the eſtate tail is an incident inſeparable to his perſon and blood, and cannot be transferred to any other; which is the reaſon that one cannot plead a *que eſtate* of a tenant in tail.

Hob. 337. Pl. Com. 161. a.

THIRDLY, Becauſe the privity of eſtate remains betwixt the donor and him, and cannot be transferred over; and much more ſtrong where the reverſion is to the king, the privity remains in him for the benefit of the king; which is the reaſon that the donor may avow upon him for his rent, and ſhall not be compelled to alter his avowry, as 48. *Edw.* 3. *pl.* 8. 5. *Edw.* 4. *pl.* 34. 4. *Hen.* 4. *pl.* 32.; and that if his heir within age recovers in a *formedon*, he ſhall be in ward: and in caſe of the king, where tenant in tail, remainder in the king, makes a feoffment, yet his heir within age ſhall be in ward to the king before entry or recovery, as FITZHERBERT's *Natura Brevium*, by reaſon of the privity betwixt the king and his tenant in tail; which cannot be altered.

Hob. 337. Pl. Com. 561. a.

THE FOURTH REASON, which they much inſiſted upon, was, That the right always remained in him, and is forfeitable by the ſtatutes of 33. *Hen.* 8. c. 20. and 1. *Mary*, ſeſſ. 1. c. 1.: for the writ of FORMEDON *in deſcender* ſuppoſeth *quòd deſcendit jus*; and the declaration mentions as much, which always ought to comprehend truth; which proves that the law accounts the right to be in him, and from the father deſcended to his ſon; and then being in him, it is forfeitable by his attainder of treaſon.

Hob. 344.

THE FIFTH REASON, That it is for the greater benefit of the Crown to expound it moſt ſtrongly againſt traitors and their iſſues, for the king's profit and diſcouragement of traitors, that they ſhould not hope their iſſue ſhould inherit; and they much relied upon the judgment in print in *Walſingham's Caſe* (*b*): and they ſaid, although it were queſtioned by a writ of error, yet it was af-

(*a*) Plowd. 547. (*b*) Plowd. 547.

firmed,

Stone against Newman.

firmed, and the land enjoyed always after the judgment; and upon *Lord Sheffield's Case* (*a*), which was adjudged upon a writ of error brought in the exchequer chamber, where the judgment was, that the land of tenant in tail after a feoffment was forfeited to the king.

But againſt that it was argued by Hutton, *Juſtice*, Jones, *Juſtice*, Myself, and Lord Finch, who, as I heard, concurred with our reaſons, that the judgment ought to be given for the defendant.

First, That although the reverſion is in the king, and there is no diſcontinuance, yet all is diveſted out of the feoffor, as ſtrongly as if there had been a diſcontinuance: and if it had been a feoffment by tenant in tail, the reverſion to a common perſon, after ſuch feoffment and diſcontinuance, nothing remained, and nothing can be forfeited; as it is agreed in *The Marquis of Wincheſter's Caſe* (*b*), and *Doubtye's Caſe* (*c*), that right of entry is only forfeited, and not right of action: and although it hath been much inſiſted on by the other ſide, that when there is no diſcontinuance, no eſtate paſſeth but for the life of tenant in tail, ſo that the reverſion of the eſtate and the right remain in him; and urged it out of the words of *Littleton* (*d*), that no eſtate paſſeth but for the life of tenant in tail; yet it was thereto anſwered, that clearly an eſtate in fee paſſeth to the feoffee, deſcendible from him to his iſſue, and whereof the wife of the feoffee ſhall have dower, and the feoffee ſhall have, after a recovery by default, a writ of right and a *quod ei deforceat*: and the intent of *Littleton* (*e*) is, that the feoffee or grantee of the reverſion hath no more right to the eſtate than for the life of the tenant in tail; but the fee in the interim paſſeth to the feoffee; as in caſe of exchange (*f*), and in the caſe of the *grant* of a reverſion (*g*), and *Seymor's Caſe* (*h*), the *Caſe of Fines* (*i*), *The Year-Book* (*k*), and *Plowden* (*l*). And if tenant for life, reverſion to the king, make a feoffment, it cannot touch the reverſion in the king, nor a fee deſcendible paſſeth: but where tenant in tail, reverſion to the king, makes a feoffment, there a baſe fee ſhall paſs, determinable by the entry of the iſſue in tail: but out of an eſtate for life, where the reverſion is not touched, no fee ſhall paſs but only an eſtate which paſſeth as an occupancy; as the difference is *Co. Lit.* 339. b. tenant in tail, reverſion to the king, is diſſeiſed, and a deſcent caſt, it is good, and ſhall bind the iſſue; but tenant for life, the reverſion to the king, is diſſeiſed, no diſcent can be caſt, becauſe a fee cannot be extracted out of an eſtate for life. And 18. *Edw.* 3. *pl.* 12. where tenant in tail, reverſion to the king, makes a leaſe for life, he gains a new reverſion, and it ſhall deſcend to his iſſue. And Jones cited *Stratfield v. Dover* (*m*), that a diſcent upon tenant in tail, reverſion to the queen, ſhall bar the entry of the tenant in tail and his iſſue.

(*a*) 21. Jac. 1. Hob. 334. Palm. 351. 2. Roll. Rep. 312.
(*b*) 3. Co. 2.
(*c*) 3. Co. 11.
(*d*) Sect. 650.
(*e*) Sect. 650.
(*f*) Year-Books, 9. Edw. 4. pl. 22. 8. Hen. 6. pl. 23.
(*g*) Year-Books 24. Edw. 3. pl. 28. 33. Hen. 7. pl. 10. 21. Hen. 7. pl. 41.
(*h*) 10. Co. 96.
(*i*) 3. Co. 84. b. Co. Lit. 335. a.
(*k*) 22. Rich. 2. pl. 50.
(*l*) Plowd. 557.
(*m*) Cro. Eliz. 595. But ſee Mr. Butler's note of Lord Nottingham's MSS. upon this caſe, Co. Lit. 373. a. note (2).

Secondly,

STONE *againſt* NEWMAN.

SECONDLY, Although it was ſaid, that the privity of eſtate cannot be drawn out of him, they anſwered, True it is, none can be tenant in tail but the donee and his iſſue, and that avowry ſhall be made upon him, and his heir ſhall be in ward: ſo where tenant in dower, or by the courteſy, alien their eſtates, no eſtate remains in them; yet for the privity which was once in them, an action Co. Lit. 54. a. of waſte lies againſt them, as *Fitzh. N. B.* 55. *e.* is. And *quoad* the avowry, that may be; for otherwiſe the donor ſhould confeſs his reverſion to be out of him, and thereby ſhould deſtroy his avowry, as *Co. Lit.* 269. a. is: and for the wardſhip, though the privity betwixt the king and the tenant in tail is deſtroyed, the iſſue in tail cannot contradict it. And to the objection, that the reverſion being in the king is not touched, and of neceſſity the particular eſtate muſt remain for the upholding of the reverſion; and that there cannot be a reverſion, but in regard of a particular eſtate remaining; it was thereto anſwered, that a common recovery before Pl. Com. 555. a. the ſtatute of 34. *Hen.* 8. c. 20. had barred an eſtate tail, where the Co. Lit. 335. a. reverſion in the king was not touched: and the recoveror ſhould have a fee during the time that the tenant in tail had iſſue; as 28. *Hen.* 8. *Dyer*, 31. and 15. *Edw.* 4. *pl.* 9. lord of a villain tenant in tail enters, that ſhall not touch the reverſion; and in *Wiſeman's Caſe* (*a*), where tenant in tail of the gift of a common perſon, remainder to the king at this day, ſuffers a common recovery, it ſhall Co. Lit. 372. b. bar the eſtate tail, but not the remainder; and *Plowd.* 557. tenant in tail of a common perſon is attainted of treaſon, the king ſhall have a fee, yet the fee of the donor is not touched.

THIRDLY, They all argued, that againſt his feoffment no right remained in him, *nec jus in re, nec jus ad rem*, for the feoffment gave away all his right, intereſt, and poſſibilities; as 9. *Hen.* 7. *pl.* 1. 39. *Hen.* 6. *pl.* 43. 12. *Edw.* 4. *pl.* 32. 1. *Edw.* 4. *pl.* 81. 19. *Hen.* 7. and *Plowd.* 374. tenant in tail makes a feoffment, there remains no right in him; and if afterwards a fine be levied by the conuſee, the iſſue in tail is the firſt who hath right to impeach it.

TO THE FOURTH, That the writ and declaration in a *formedon* do ſuppoſe *quòd jus deſcendit*, it was anſwered, that it was but form, and not *in rei veritate*; and he doth not ſay *ſimpliciter deſcendit jus*, but *deſcendit per formam doni:* and it is not properly ſaid *deſcendit* Hob. 337. *jus*, but *devenit jus*; as in *Plowd.* 374. by SOUTHCOTE, WESTON, and DYER, *Juſtices:* and it is but form, as in waſte, ſuppoſing that he held *ad terminum annorum*, where he held but for half a year; and 40. *Edw.* 3. *pl.* 5. and 38. *Hen.* 6. *pl.* 3. *in conſimili caſu*, ſuppoſing that he aliened in fee, it is good, though he aliened but for life. So in the caſe of *Holland v. Lee* (*b*), where a fine was levied, and by it the eſtate tail barred in error to reverſe this, it is ſuppoſed *quòd remanſit jus*, or *quòd deſcendit jus*, as the caſe requires.

TO THE FIFTH, That it is for the greater benefit to the Crown, and the greater diſcouragement of traitors, &c. it was anſwered, that the right was to be reſpected; and it is not to be preſumed, that they would commit treaſon, or had an intent thereto; for ſuch foreign intendments are not to be preſumed, as 30. *Hen.* 6. "*Grant*," 41. Grant of land after it ſhall eſcheat is void, becauſe

(*a*) 2. Co. 15. b. and under the name of Wiſeman v. Barnard, Moor, 195. Hughes' Entries, 37.

(*b*) See Darcey v. Jackſon, Palm. 115. 149. 224. 1. Roll. Rep. 73. 301. Cro. Eliz. 739. 774.

it

STONE *againſt* NEWMAN.

it is not intendible. And as to the caſes pretended to be adjudged, it was anſwered, that *Walſingham's Caſe* was impeached by a writ of error, and was affirmed for default in the pleading; and being demanded, If it were for matter of law? it was not anſwered; and if it had been for the matter in law, they would have been ready for the queen's advantage to have had it ſo publiſhed. Alſo within two years after (*viz.* in 18. *Eliz.* in the common pleas, in *Moulton's Caſe*) (*a*), it was argued openly by all the four Juſtices, who by intendment had notice of the former judgment; and they all argued, that the eſtate tail was not forfeited, by reaſon of this feoffment which ſaved it, and this judgment was never impeached by a writ of error; yet it is very likely, if the Juſtices of the king's bench had concurred with the Barons for the matter in law, the ſaid laſt judgment would have been impeached by a writ of error. And as to the judgment in *Sheffield's Caſe*, it was alledged to be very well known, that ſome of the Judges who died before their opinions delivered, were againſt the ſaid judgment, as appeared by their arguments, and that the judgment in that caſe was obtained by one voice only. And although that judgment ſhould be allowed to be good, yet it much differs from this caſe; for here the tenant in tail hath neither freehold, poſſeſſion, nor right.

But after this Term, becauſe the greater opinion was for the plaintiff, it was prayed in the king's bench to have judgment for the plaintiff.

But there it was moved in ſtay of judgment, that the bar to the avowry was not good:

FIRST, Becauſe it doth not ſhew, that after the attainder of *Sir Thomas Wyat* there was any ſeiſin for the queen, and *Sir Francis Wyat* had good title until ſeiſin.

SECONDLY, Becauſe it is pleaded, that the indictment and proceedings were before the commiſſioners, and does not ſay *ſub magno ſigillo*.

And for theſe cauſes the Court would adviſe (*b*).

(*a*) Cro. Eliz. 151. 2. Leon. 211. 3. Leon. 232.

(*b*) Theſe objections were moved again in Eaſter Term, and all the Court agreed, that although it were the better courſe to ſhew that it was *ſub magno ſigillo*, yet being omitted, it is well enough, and good both ways. But judgment was entered for the plaintiff. Poſt. page 461.

Hilary

Hilary Term,

11. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

Memorandum.

The deaths of ASHLEY, King's Serjeant. Mr. Recorder MASON and PYE, Attorney of the Court of Wards. CALTHROP and GARDENER promoted. Jones, 375.

IN the vacation after *Michaelmas Term*, SIR FRANCIS ASHLEY, *the King's Serjeant*, who died the day before the end of the Term in *Serjeant's Inn*; ROBERT MASON, of *Lincoln's Inn*, Eſquire, Recorder of *London*, who died in *Lincoln's Inn* 21. *December*; and SIR WALTER PYE, of the *Middle Temple*, Knight, Attorney of the Court of Wards, who died the 25th of *December*, were carried down and buried in their ſeveral counties, accompanied with two heralds in their coats of arms, with divers coaches of nobles and others, who accompanied their bodies until beyond *Charing Croſs*. And HENRY CALTHROP, of the *Middle Temple*, *London*, was made Recorder of *London*, and ſo continued three weeks. Afterwards he was knighted, removed, and made Attorney of the Court of Wards the firſt day of this Term; and THOMAS GARDENER, of the *Inner Temple*, Eſquire, was elected Recorder of *London*.

CASE 2.

Spooner *againſt* Day and Maſon.

Michaelmas Term, 6. *Car.* 1. *Roll* 183.

A preſcription cannot be pleaded againſt a preſcription; and therefore if a man preſcribe for a common, the plea of a *cuſtom* to incloſe it is void. S. C. Jones, 375. 1. Roll. Abr. 401. 565. Cro. Jac. 519. 2. Com. Dig. 428. 435. 540.

ERROR of a judgment in the common pleas, in an action on the caſe. Whereas *Robert Futter* was ſeiſed in fee of the manor of *Thompſon*, and he and his anceſtors, &c. time whereof, &c. had A FOLD-COURSE (*a*) for his and their ſheep, not exceeding three hundred and ſeventy acres of land, in *Thompſon*, every year from fourteen days after the corn was carried away, to continue until *Lady-Day*, within the lands not ſown again; and ſhews, that he let by deed to the plaintiff ſeventy-five acres, parcel of the manor, with the fold-courſe, for five years, and that the defendants incloſed, and thereby had diſturbed him of his fold-courſe.

One of the defendants pleaded not guilty.

The other pleaded in bar, that there is a cuſtom within the ſaid vill, that any one may incloſe any part of his lands lying in the common fields, and therefore he incloſed this land, lying in the common field.

The plaintiff hereupon demurred.

And without any difficulty IT WAS ADJUDGED, that the bar was not good, becauſe he doth not traverſe the preſcription in the declaration; and he cannot plead a preſcription againſt a preſcription; but he ought to anſwer the preſcription alledged in the count.

(*a*) See *Mr. Hargrave's* Co. Lit. 6. note (1).

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In the common pleas an exception was taken to the declaration, That it was not good, becauſe A FOLD-COURSE, being appurtenant to a manor, cannot be divided and annexed to parcel thereof; and therefore that the plaintiff had not any title. But the exception was there over-ruled, and adjudged for the plaintiff; and this point was now aſſigned here for error; and, after divers arguments, THE COURT this Term adjudged it to be good enough; for being but in nature of a common certain, it may be well divided or annexed to parcel of the manor; and there cannot be any prejudice to the terre-tenants, for they ſhall not be charged with more than they were before. Wherefore the judgment was affirmed. *Vide* 5. *Hen.* 7. *pl.* 7. 1. *Hen.* 7. *pl.* 24. 1. *Edw.* 3. *pl.* 1. 27. *Hen.* 8. *pl.* 10. 11. *Hen.* 6. *pl.* 22. 1. *Levinz.* 231.

The common-age of a common appurtenant certain, may be divided, or annexed to parcel of the manor.

Jones, 375. 1. Bac. Abr. 388. 2. Term Rep. 415.

Richard Hayes *againſt* Robert Hayes.

CASE 3.

Hilary Term, 10. *Car.* 1. *Roll* 1045.

DEBT, upon an obligation of one thouſand pounds, conditioned for the performance of the arbitrament of HENRY CLERK and ROBERT SHARP, *of the Middle Temple*, Eſquires, of all controverſies and demands betwixt the ſaid *Richard Hayes* and *Robert Hayes*.

The defendant pleaded, *quòd nullum fecerunt arbitrium*.

The plaintiff replies, that *Robert Hayes*, father of the plaintiff and defendant, was ſeiſed in fee of divers lands in *Kent*, and had iſſue the plaintiff *Richard Hayes*, the defendant *Robert Hayes*, and *William Hayes*, and deviſed divers lands to the ſaid *Robert* and *William*; and that there were controverſies betwixt the plaintiff and the ſaid *Robert* and *William* concerning the ſaid land, for which the plaintiff entered into bond to the ſaid *Robert* and *William* to perform the award of the ſaid arbitrators; and that *Robert* at that time entered into one bond by himſelf, and *William*, at the ſame time, into another bond, to perform the ſaid award; and ſhews their arbitrament, that *Richard* ſhould releaſe to the ſaid *Robert* and *William*, &c. and that *Robert* and *William* ſhould pay to the ſaid *Richard* three hundred pounds at ſuch a time and place; and for non-payment of the ſaid three hundred pounds the breach was aſſigned.

Where *joint claimants* ſubmit to an arbitration, and enter into *ſeparate* bonds to the oppoſite party, to abide by the award; if the award be general, that ſuch joint claimants ſhall do an entire thing, each of them are bound for the performance of the whole award, although their bonds were ſeveral. 1. Roll. Abr. 248. 415. 1. Lutw. 577. Plowd. 285. 1. Bac. Abr. 137. 1. Com. Dig. 378. 384. Kyd's Treatiſe of Awards, 8.

The defendant hereupon demurred.

FARRER argued *for the defendant*, that this arbitrament is void; for the defendant's bond is for a reference of all controverſies betwixt *Richard* and *Robert*, and *William* is not mentioned in the bond; and the award is betwixt *Richard*, *Robert*, and *William*, and that *William* and *Robert* ſhould pay ſuch a ſum, and the breach is alledged therein, and for any thing that appears in the bond and condition *William* is a ſtranger to the ſubmiſſion, unleſs by this collateral ſurmiſe, which ſurmiſe is not allowable; alſo this ſurmiſe is *quaſi* a departure from the declaration.

But after divers arguments at the bar, ALL THE COURT reſolved, that the replication was good enough to maintain the arbitrament notwithſtanding this objection; foraſmuch as this is not a bare ſurmiſe, but grounded on a deed which is of as high a nature as the other, and made at the ſame time, it is *quaſi* but one ſubmiſſion by

HAYES *against* HAYES.

by ſeveral bonds, and ſo the ſurmiſe is allowable, and ſtands well with the bond in queſtion. And although the two brothers did not join in one bond of ſubmiſſion, becauſe they would not be bound one for the other; yet when at the ſame time they enter into ſeveral bonds to perform the award, it is but as one ſubmiſſion, and is not any departure from the declaration; for it is not fitting that the declaration (which is but for the debt upon the bond of *Robert*) ſhould mention any ſuch ſubmiſſion, but it ſufficeth to ſhew it by the replication to maintain this arbitrament.

THE SECOND OBJECTION was, That this arbitrament was not good, becauſe the ſubmiſſion was only for land whereof the father was ſeiſed at the day of his death, and deviſed, or mentioned to be deviſed, to the ſaid *William* and *Robert*, or to the uſe of them, and the arbitrament is, that he ſhall make a releaſe of his right in the lands conveyed or deviſed, and there is no authority to meddle with the land conveyed.—*Sed non allocatur*; for it ſhall not be intended that there were any lands conveyed to make the arbitrament void unleſs it had been ſhewn, and the breach is aſſigned for the non-payment of the three hundred pounds awarded. Wherefore rule was given, that judgment ſhould be entered for the plaintiff.

1. Roll. Abr. 242.

CASE 4.

Bradſtock *againſt* Henry Scovell and Others.

Trinity Term, 11. *Car.* 1. *Roll* 1097.

A fine levied by the heir in tail, who dies without iſſue in the life-time of the tenant in tail, ſhall not bar the entry of his younger brother after the death of the tenant in tail.

ERROR of a judgment in the common pleas, in an ejectment of a meſſuage and land in *Wickhampton*, of a leaſe by *Thomas Baſton* to the ſaid *Henry Scovell*, where, upon not guilty pleaded, and a ſpecial verdict found, the caſe was, *Thomas Baſton*, ſeiſed in fee of thoſe tenements, conveys them to the uſe of *Thomas Baſton* his ſon and *Edith* his wife, and the heirs of their bodies, for a jointure for his wife; *Thomas* the ſon and *Edith* enters, and, being ſeiſed in tail, have iſſue *Philip* their eldeſt ſon, and *Thomas*, THE LESSOR, their ſecond ſon; *Thomas* their father dies; *Edith* takes to her ſecond huſband *Thomas Bulford*; they, by indenture, for ſix pounds alien, bargain, ſell, and grant to the ſaid *Philip* and his heirs, all their right, title, and intereſt which they have in the ſaid tenement, no livery nor inrollment being found: then the ſaid *Philip Baſton*, by indenture, for eighty pounds, bargained, ſold, and confirmed thoſe tenements to one *Henry Bradſtock*, and levies a fine with proclamation to the ſaid *Henry Bradſtock*, to the uſe of him and his heirs; and afterward *Philip* dies without iſſue, then *Edith* dies; after the ſaid *Thomas Baſton* the ſecond ſon enters and makes this leaſe, and the defendant *ouſts* him; *et ſi ſuper*, &c.

Jones, 689. 3. Co. 61. Hob. 333. 3. Com. Dig. 234. 2. Bac. Abr. 530, 531. Cruize, 167.

The ſole queſtion was, Whether this fine by *Philip* the eldeſt ſon, in the life of his mother, tenant in tail, and he dying without iſſue in the life of his mother, ſhall bar *Thomas* the ſecond ſon, or not?

And after argument at the bar and bench in the court of common pleas, by the opinion of HEATH, *Chief Juſtice*, HUTTON, and VERNON, it was adjudged for the plaintiff, that this fine ſhould not be a bar to *Thomas*; but CRAWLEY, *Juſtice*, to the contrary.

Jones, 34.

And now error being brought, was aſſigned in point of law; and, after ſeveral arguments at the bar, ALL THE FOUR JUSTICES agreed,

agreed, that the judgment ſhould be affirmed; for this fine levied by the eldeſt ſon, who was never ſeiſed by force of the intail, and dying without iſſue before the intail deſcended upon him, is not a fine within the ſtatutes of 32. *Hen.* 8. c. 36. nor of 4. *Hen.* 7. c. 24. to bar the intail: for although he be inheritable to the tail, and, if he had ſurvived, his fine had been a bar to his brother, yet foraſmuch as he died in the life of his anceſtor, and never had the eſtate tail, the younger brother ſhall never mention him in a *formedon in the deſcender* (*a*), he never being anceſtor in tail to his younger brother, nor any ſuch anceſtor to whom the land was intailed; and therefore it is not like to *Archer's Caſe* (*b*), where the father diſſeiſes the grandfather, or is infeoffed by the grandfather, and levies a fine with proclamations, and dies in the life of the grandfather, and afterwards the grandfather dies, his ſon ſhall be barred, for he ought to claim by him, and he is one to whoſe anceſtors the land was intailed. And it was compared by BERKLEY to the caſe where the father is attainted of felony in the life of the grandfather, and hath iſſue a ſon and dies; afterward the grandfather dies, the land ſhall eſcheat, for the ſon ought to make his deſcent by him, which cannot be. But if the eldeſt ſon had been attainted in the life of the father, and had died without iſſue in the life of his father, his ſecond brother ſhould not have been barred. But if the eldeſt ſon had ſurvived the father, and died after without iſſue, his younger brother ſhould never have inherited. And for this point JONES ſaid, that when he was a Judge in the common pleas, it was ſo adjudged in *The Caſe of Mackwilliams* (*c*); and ſo alſo in this court in the Caſe of *Croker v. Kelſey* (*d*), and afterward affirmed in a writ of error. And although *Littleton* (*e*) ſaith, that "if the middle brother make a warranty and die without iſſue, "his warranty is lineal to his younger brother, for that by poſſi- "bility the younger brother might have inherited, ſo as he is, "*quodammodo*, ſaid to be his anceſtor," yet that is only but a poſſibility, and by reaſon of the maxim; but it is not to be conſtrued ſo here in the caſe of a fine, for it ought to be levied by him who had the eſtate tail once in him, or to whoſe anceſtor the land was intailed, and by whom the conveyance by deſcent ought to be made. But where he needs not to be mentioned in the conveyance by deſcent, there his fine ſhall never bar. And *Grant's Caſe* (*f*) was cited, where lands were deviſed to one, when he came to the age of twenty-five years, in tail, and he, before the age of twenty-five years, levies a fine with proclamation, and after attained the ſaid age, and had iſſue and died, this fine ſhall bar the iſſue: for although he was not tenant in tail at the time of the fine levied, yet having attained the age of twenty-five years, he was the perſon to whom the land was intailed; ſo he is within the words and intent of the ſtatute, that this fine ſhall bar his iſſue which claim under that intail. Wherefore here in the principal caſe ALL THE JUSTICES agreed, that the judgment was well given; wherefore the judgment was affirmed.

BRADSTOCK *againſt* SCOVELL and OTHERS.

Hob. 332. Moor 252. Poſt. 525. Hob. 258. 332, 333. (*a*) 8. Co. 88. b. 5. Com. Dig. 308.

Hob. 334. Dyer, 48. a. Jones 34.

Hob. 258.

Poſt. 478. Jones 601.

See the caſe of Johnſton v. Bellamy, Cro. Eliz. 122.

(*b*) Lord Zouch v. Aickin, 3. Co. 90. Hob. 258. 333. Cro. Car. 435.
(*c*) Hob. 333. Winch. 41.
(*d*) Cro. Jac. 689. W. Jones, 60. Hutton, 84. Bridg. 27. 2. Roll. Rep. 490. 498. 1. Roll. Abr. 843. Old Bendloe, 139. 143. See alſo Hargrave's Co. Lit. 28. b. *notis*.
(*e*) Co. Lit. 373, 374.
(*f*) 10. Co. 50. a.

Salter

Case 5.

Salter *againſt* Browne.

Hilary Term, 10. *Car.* 1. *Roll* 207.

To ſay of a man that "*he is the reputed father of a baſtard-child*," is not actionable, unleſs ſome *ſpecial damage* enſue. Ante, 322. 398.

ERROR of a judgment in the common pleas, in an action for words. Whereas one *Jane Jennings* was delivered of a baſtard-child, that the defendant, having communication with one *J. S.* of the plaintiff and of the ſaid baſtard-child, ſaid of the plaintiff theſe words, "He," *innuendo* the plaintiff, "is the reputed father "of that baſtard-child," *innuendo* the ſaid baſtard-child.

Judgment after verdict was given for the plaintiff, and error thereof brought and aſſigned, that theſe words are not actionable.

1. Roll. Ab. 37. 1. Roll. Rep. 244. Cro. Jac. 473. Moor, 10. 29. Cro. Eliz. 582. 1. Sid. 61. 396. 3. Mod. 120. Salk. 696. 2. Mod. 196. 1. Com. Dig. 393.

And ALL THE COURT, *abſente* BRAMPSTON, was of that opinion, unleſs he had alledged ſome temporal loſs, *viz.* that he loſt thereby his marriage, or that he by this means ſhould be chargeable for the maintenance of ſuch baſtard child, and to have further puniſhment; for it was ſaid that it had been reſolved, that a baſtard-child of perſons able to keep it, and not like to be chargeable to the pariſh, is not within the ſtatute of 18. *Eliz.* c. 5. and a reputed father is to be adjudged by the two next juſtices of the peace or the ſeſſions. Wherefore for this cauſe the judgment was reverſed. *Hil.* 10. *Car.* 1. *Roll.* 752. ſuch a caſe and ſuch judgment.

Case 6.

Clothworthy *againſt* Clothworthy.

In debt on bond or any ſpecial contract, where only part is demanded, ſatisfaction muſt be acknowledged for the reſidue.

ERROR of a judgment in a writ of annuity. The plaintiff declared againſt the defendant *as heir* to his anceſtor, who granted an annuity to him of twenty pounds a-year, payable at four Feaſts, *viz.* at *Chriſtmas*, *the Annunciation*, *the Nativity of St. John Baptiſt*, and *St. Michael*; and for thirty pounds arrear at *Michaelmas*, 3. *Car.* 1. before the writ brought, which was the 16th of *April*, 4. *Car.* &c.

3 C. Hetley, 137. Cro. Jac. 499. Allen, 57. 3. Bulſt. 244. Salk. 326. 3. Term Rep. 65.

The defendant pleads, *non eſt factum patris ſui*; and it was found againſt him, and judgment given that he ſhould recover the annuity and arrearages before the writ, and what incurred *pendente brevi*, which amounted to ſeventy pounds; and the damages and coſts; *et quòd habeat executionem* of all the tenements deſcended to him from the grantor of the annuity.

MAYNARD now aſſigned error, Becauſe the plaintiff demands this annuity and the arrearages thereof to *Michaelmas* 3. *Car.* 1. and his writ is brought 16. *April* 4. *Car.* 1. ſo as there are two quarters of that annuity not demanded, which by intendment are paid, and if they be not paid he ought to have demanded them; for if one brings debt for part of a debt due upon a contract or upon an obligation, and doth not acknowledge ſatisfaction of the reſidue, the action is not well commenced.

The judgment on a writ of annuity ſhall be for the annuity, Co. Lit. 285. 2. Com. Dig. 363.

Alſo, whether it be due or not due, the judgment is erroneous; for the judgment is, that he ſhall recover the arrears due before the and the arrears both before and after the action. Ante, 104. 137. 1. Roll. Abr. 229. 1. Roll. Rep. 88. Cro. Jac. 499. Co. Ent. 50. Hob. 88. 2. Lev. 56. 2. Leon. 51.

writ

writ (which includes theſe two quarters rents which are not demanded) and the arrears accrued *pendente brevi*, amounting *in toto* to ſeventy pounds, ſo as it includes the arrears before and hanging the writ. ROLLE anſwered thereto, that this peradventure was but the miſpriſion of the clerk in caſting up the ſum, and then it is no error, but amendable.—But THE COURT anſwered, and ſo reſolved, that it was no miſpriſion in the caſting up, but a miſpriſion in the judgment; wherefore they all held that it was erroneous (*a*). CLOTHWORTHY *againſt* CLOTHWORTHY.

(*a*) S. C. Herley 137. and Lit. Rep. 245; but neither of them report this point of the caſe.

THE SECOND ERROR, Becauſe the heir pleading a falſe plea, which is found againſt him, the execution ought to be awarded of his proper lands and of his lands deſcended.—But THE COURT held, that the denying the deed to be his father's, was not a falſe plea in his cognizance: and although it ſhould be falſe, yet being charged in reſpect of his anceſtor's deed, the land of his anceſtors ſhall only be taken in execution, for that is the cauſe of his charge; and if the land of the heir, which is his own proper land, ſhould be liable as well as the land of his anceſtor, yet it is not aſſignable for error, becauſe it is in eaſe and advantage of the heir.

But for the firſt cauſe rule was given, that the judgment ſhould be reverſed, unleſs, &c.

In debt againſt an heir on a bond of his anceſtor, the judgment, *non eſt factum*, ſhall be only of *aſſets by deſcent*. 2. Roll. Ab. 71. 5. Com. Dig. 214. 301. 4. Bac. Ab. 67. Pl. Com. 440. Dyer, 81. a. Carth. 93.

See 29. Car. 2. c. 3. and 3. & 4. Will. & Mary, c. 14.

Tregmiell and his Wife *againſt* Reeve.

CASE 7.

ACTION ON THE CASE; and declares, That *Sir John Reeve* was ſeiſed in fee of a farm, and of an hundred acres of land thereto appertaining; and by indenture covenanted to ſtand ſeiſed to the uſe of himſelf and wife for their lives, for a jointure for his ſaid wife, and after to his ſon and heir, excepting the timber trees, ſaving that his ſaid wife ſhall have and take the ſhrowds and loppings of them; and that the ſaid *Sir John Reeve* died, and ſhe ſurvived, and took to huſband the plaintiff; and that the defendant, as heir to *Sir John Reeve*, cut down five oaks growing upon the ſaid hundred acres, whereby the plaintiff loſt all the benefit which he might have had of the ſhrowds and loppings of the ſaid trees. The defendant pleads not guilty, and the verdict was given againſt him.

If a man covenant to ſtand ſeiſed to the uſe of his ſon, ſaving that his wife ſhall have the ſhrowds and loppings of the trees, an action on the caſe will lie againſt the ſon for cutting down the trees. Jones, 376. Moor, 7. 837. Cro. Jac. 487. 11. Co. 46. 4. Mod. 12. Shower, 311. 1. Salk. 196. 6. Mod. 18. 2. Com. Dig. 559. 3. Com. Dig. 332.

HYDE took divers exceptions in arreſt of judgment. FIRST, That the excepting the trees after the limitation of the uſe is void, and then, they remaining parcel of the freehold, he might have had treſpaſs; but he could not have this action on the caſe; for as an exception after the eſtate limited is void, ſo after an uſe ſettled an exception cannot be of the trees.—*Sed non allocatur*: for an exception may well be to ſhew his intent that they ſhould not be annexed to the eſtate for life.

SECONDLY, The declaration is not good, Becauſe he doth not ſhew that he had not left ſufficient trees to have the loppings; as in the caſe of *eſtovers*, the owner of the wood may cut down the wood, leaving ſufficient for eſtovers.—*Sed non allocatur*: for here all the loppings of all the trees are reſerved to the wife, all which

On an action for waſte, where all the loppings are the property of the plaintiff, the quantity cut need not be ſhewn.

Tremiels *against* Reave.

An action for cutting five oaks growing on a hundred acres.

In an action on the case for cutting down trees the lops of which were reserved to the wife for life, the husband may sue alone. Ante, 419. Post. 505 —— Stra. 229.

she may cut down and sell at her pleasure; so it is a wrong to her to cut down any.

THIRDLY, Because it is supposed, that the defendant cut down five oaks growing upon an hundred acres of land, which is not possible that five oaks should grow upon an hundred acres.—*Sed non allocatur:* for it is to be intended that they grew upon some part of the farm.

FOURTHLY, Because the action is brought by the husband and wife, where the husband alone should have brought the action, for he only might have released the damages, and the wrong is to his possession.—*Sed non allocatur:* for the husband having the land in right of his wife, he may well join her with him in suing for the damages; and she shall have the damages, and the action also, if she survive her husband: wherefore judgment was given for the plaintiff.

Cro. Jac. 110. 2. Vent. 195. Cro. Eliz. 461. 608. Jones, 325. 1. Com. Dig. 578.

Case 8.

Tolson *against* Clerk.

Trinity Term, 11. *Car.* 1. *Roll* 687.

A promise in consideration that the plaintiff would *aliquo tempore* forbear, will not support an *assumpsit*. Ante, 241. 1. Roll. Ab. 23. Cro. Jac. 250. 683. 2. Sid. 45. Hob. 216. Cro Eliz. 387. 2. Com. Dig. 138.

ERROR of a judgment in the common pleas, in *assumpsit*. The plaintiff declares, Whereas the defendant was indebted to him in such a sum, that in consideration the plaintiff would *aliquo tempore* forbear him, he promised to pay, &c.; and alledges, that he forbore for a year or more, and that the defendant hath not yet paid, &c.

After verdict upon *non assumpsit*, and judgment for the plaintiff, it was assigned for error by GRIMSTON, and so held to be error, That *aliquo tempore* is so short a time, that it is no consideration, no more than *per paullulum tempus*.—Wherefore for this cause the judgment was reversed.

Case 9.

Brunsden's Case.

The traverse (of a defendant out of custody) for a misdemeanor cannot be taken and tried at the same quarter sessions of *the peace* Post. 448. 2. Inst. 568. 4. Inst. 164. Jones, 379. Cro. Jac. 404. 1. Sid. 69. 334. 2. Hale P. C. 28. 4. Com. Dig. 256.

BRUNSDEN was indicted for *extortion* by two several indictments: in the one, that he, as bailiff of the sheriff of *Wiltshire*, had received twenty shillings from one *extorsivè colore officii sui*; and in the other, that he *extorsivè* took six shillings and eight-pence. These being preferred against him before the justices of the peace at *Michaelmas* sessions last in the county of *Wilts*, and he thereupon committed to prison, was enforced (as he pretended) to plead presently to those indictments. And the same day they were tried, and he convicted, and judgment against him at one and the same sessions, that he should be imprisoned and fined forty pounds for the one offence, and for the other twenty pounds, and upon every of them treble damages given, *viz.* for the one three pounds, and for the other twenty-six shillings eight-pence (which was more by six shillings eight-pence than he had received), and to be committed to prison until he had paid those fines and damages. And now upon these judgments he brought several writs of error.

And by GRIMSTON it was assigned for error, FIRST, Because the indictment and the trial were at one and the same sessions, whereas they ought not to be tried and traversed the same sessions.

SECONDLY,

SECONDLY, Becauſe they gave damages to the party, where they ought not to have given any damages (*a*). *Vide* 4. *Hen.* 5. "*Inqueſt.*" 55. & 22. *Edw.* 4. "*Coron.* 44." that Juſtices of gaol-delivery may take inqueſt the ſame day; but not ſo of juſtices of peace. *Stanford*, 155.

(*a*) This caſe was moved again, and for theſe two errors the judgment was reverſed. Poſt. 448.

The King *againſt* The Inhabitants of Epworth and Fifteen other Vills.

CASE 10.

Michaelmas Term, 11. *Car.* 1. *Roll* 146.

THE king, by a writ out of the chancery, dated 16. *June*, 11. *Car.* 1. commanded the ſheriff of *Lincoln*, that he *per ſacramentum proborum et legalium hominum comitatûs prædicti diligenter inquirat, qui malefactores et pacis regis perturbatores apud* EPWORTH, BELTON, *et* HACKSEY, *infra manerium regis de* EPWORTH, *ſepes, foſſata, et penſuras, ibidem nuper levata, noctanter proſtraviſſent; et ponet per vadios et ſalvos plegios quos culpabiles invenerit, ad reſpondendum in banco regis de et ſuper præmiſſis in Octabis Michaelis enſuant; et quòd haberet ibi nomina eorum per quorum ſacramentum inquiſitionem illam fecerit, et breve illud.*

A *diſtringas* lies on a *noctanter* if the miſdoers are not indicted within a *convenient time*, tho' within the year.—The ſtatute extends to all incloſures.—The defendants muſt plead, *viz.* that the offenders have been indicted, upon the return of the *diſtringas*. *Vide* ante, 280. Poſt. 580. and the caſes there cited. See alſo 29. Geo. 2. c. 36. and 31. Geo. 1. c. 41. for the modern mode of incloſing commons.

The ſheriff hereupon returned an inquiſition taken 3. *October*, 11. *Car.* 1. *apud* LINCOLN, whereby it is found, *quòd quidam malefactores et pacis regis perturbatores primo Maii*, 10. *Car.* 1. *et diverſis diebus et vicibus inter* the ſaid firſt day of *May*, 10. *Car.* 1. *et primo Junii*, 11. *Car.* 1. *apud* EPWORTH, BELTON, *et* HACKSEY *prædict. infra manerium regis de* EPWORTH *prædict. vi et armis, et cum multitudine gentium ignotorum*, 700 *perticatas foſſatorum penſurarum regis apud* EPWORTH, BELTON, *et* HACKSEY *prædict. nuper levat. in noctibus dictorum dierum proſtraverunt, ad grave damnum dicti domini regis. Sed qui illa foſſata et penſuras, vel aliquam partem eorundem, ſic proſtraverunt, juratores prædicti penitus ignorant. Et ſimiliter dicunt, quòd malefactores prædicti qui malefacta prædicta taliter ut ſupra dictum eſt fecerunt, cum tali vi et multitudine gentium, et in nocturnis temporibus prædictis commiſerunt et perpetraverunt, ita quòd nullus ad eos appropinquare ad ipſos cognoſcendos auſus fuit.*

1. Com. Dig. 431, 432. 1. Hawk. P. C. 191. 2. Term Rep. 391.

Upon this return *a writ of diſtringas* iſſued out of the king's bench, teſted 9. *October*, 11. *Car.* 1. reciting the ſaid writ, return, and inquiſition, commanding the ſheriff to diſtrain *propinquas villatas foſſata et penſuras prædicta circumadjacentes foſſata et penſuras prædicta proſtrat. levare ad cuſtus ſuos proprios*; and commanding him to inquire *per ſacramentum proborum, &c. quod damnum rex ſuſtinuit occaſione proſternationis prædictarum* 700 *perticarum foſſatorum et penſurarum, et damna illa nobis reſtituas.*

This writ was returnable *Craſtino Martini* following; and hereupon the ſheriff returned, *quòd villata de* EPWORTH, and fifteen other villages there named, are the neareſt villages circumadjacent to the foreſaid ditches and fences, *et quòd rex ſuſtinuit damna occaſione in brevi prædicto ſpecificat. ad* 2500*l. et quòd propter brevitatem temporis non potuit levare damna prædicta de terris et tenementis illis, ita quòd dicto domino regi reſtituat*; and returned iſſues upon the inhabitants of every village *ad levationem foſſatorum et penſurarum prædict. ad* 20*l.*

See 13. Geo. 3. c. 81.

THE KING *against* THE INHABITANTS OF EPWORTH, &c.

Ante, 281.

Afterward another *writ of diſtringas*, 28. *Nov.* 11. *Car.* 1. iſſued, reciting the firſt writ and the return thereupon, and the writ of *diſtringas* and the return thereupon; and that the king is informed, that the ſaid *foſſata et penſuræ nondum levata exiſtunt*, and therefore commanded the ſaid ſheriff to diſtrain the ſaid villages of EPWORTH, &c. *per omnia terras et catalla ſua, &c. ita quòd ipſi ad cuſtus ſuos proprios foſſata et penſuras prædicta proſtrata levent; ac nobis prædict.* 2500*l. pro damnis prædictis quæ nos ſuſtinuimus occaſione proſtrationis prædict.* 700 *perticarum, foſſatorum, et penſurarum, reſtituant.*

ROLLE upon this moved, that the firſt writ was not well granted; for it appears by the writ and inquiſition, that the proſtration began the firſt day of *May* 10. *Car.* 1. and continued till the firſt of *June* 11. *Car.* 1. ſo as it was a ſhort time, *viz.* but five days, before the writ brought, which ought not to be; but there ought to be ſo long diſtance as the country may have a convenient time to inquire, which ought to be a year; and ſo it was held in 12. *Jac.* 1.

2. Inſt. 476. 2. Litt. Ab. 217. 1. Keb. 545.

SECONDLY, It doth not appear that this *proſtration* was of any fences, &c. of the common which was improved; for the ſtatute doth not extend to all incloſures, but to the throwing down of fences upon improvements of commons.

THIRDLY, That the writ doth not make any mention that the malefactors were not indicted.

2. Inſt. 476. 1. Bac. Abr. 393.

But SIR JOHN BANKS, *the King's Attorney*, anſwered to the FIRST, That he had ſeen the reſolution in 12. *Jac.* 1. and it was not, that there ſhould be a year to indict the offenders, but there ought to be *a convenient time*, and that the Court ſhall adjudge whether the time were convenient.

SECONDLY, The ſtatute doth not only extend to the proſtration of incloſures to be improved out of the common, but to all incloſures; and it is for the benefit and peace of the commonwealth, and ſhall be expounded moſt favourably for the king and the benefit of the commonwealth; and if it extends only to improvement of commons, it ought to have been pleaded (*a*), that this incloſure was not any parcel of the common improved.

Ante, 281.

(*a*) Vide Raym. 487.

THIRDLY, The defendants ſhould have pleaded, if any of the offenders had been indicted—*Et adjournatur.*

CASE 11.

Hilton *againſt* Bembridge.

Trinity Term, 11. *Car.* 1. *Roll*

Aſſent to a ſtranger, by tenant for life, to a conveyance of the remainder in fee, is a good attornment.

8. C. Jones, 276. 1. Roll. Ab. 505. 300 Co Lit. 309. a. 310. a. Wright's Ten. 30. Dougl. 283.

TRESPASS *quare clauſum fregit.* Upon not guilty a ſpecial verdict found, the caſe was, That *George Bembridge* was tenant for life, remainder to *Anthony Bembridge* in tail. *Anthony*, by his deed, granted the remainder to the plaintiff in fee. The ſaid *George Bembridge*, being tenant for life, having notice of this grant, ſaid to *T. H.* and *J. S.* two ſtrangers, that "he was well pleaſed and "content that the ſaid grant was made to the plaintiff, for he was "his couſin." And that the ſaid *George Bembridge* was dead, and *Anthony Bembridge* is yet alive: and if this were a good attornment (*b*), they find for the plaintiff; if not, for the defendant.

(*b*) See 4. & 5. Ann. c. 16. and 11. attornment is taken away; and Mr. *Butler's* Geo. 2. c. 19. by which the neceſſity of note, Co. Lit. 309. a.

After.

After argument at the bar by WIDDRINGTON, *for the plaintiff*, and BULSTRODE, *for the defendant*, upon the first argument, ALL THE COURT agreed, that it was an attornment, although the words were spoken to those who were mere strangers, and who peradventure had not any notice of the grant, nor were sent or required by the grantee to take attornment, nor required the tenant to assent, but was a voluntary speech only; for it sufficeth, that the tenant hath notice of the grant and assents thereto. *See Bracton, fol.* 81. And it is for the benefit of the grantee, who having the grant, and accepting of that assent, shall be intended to agree thereto in the life of the tenant for life; because, being a lawful act, the law accounts that he agreed to that attornment: and it is not necessary to attorn to the grantee himself; for all the pleading is, *à quel grant joy attornera*, without mentioning the attornment to be to the grantee or any other: and if the tenant indorse his hand as a witness to the deed of grant of the reversion, it is a good attornment, unless he doth not know what was in the deed; for he ought to have perfect cognizance of the grant, otherwise it is not a good attornment. Whereupon, without any further argument, the attornment was held to be good, and adjudged for the plaintiff. *Vide Co. Lit.* 310. a. and 2. *Co.* 69. a. that assent to a stranger sufficeth. And the case of 28. *Hen.* 8. "*Attornment*," 40. that attornment to a servant was not good, was here denied to be law.

HILTON *against* EMMERIDGE.

Stockman *against* Hampton.

CAS. 12.

Trinity Term, 11. *Car.* 1. *Roll* 752.

TRESPASS *quare clausum fregit*, and chasing his cattle. The defendant justifies, for that *Sir Bartholomew Michael* was seised in fee, and died seised, which descended to his two daughters and heirs, and he by their command, &c.

In trespass, if the defendant justify by command of the heir of *A.* who died seised in fee, and the plaintiff replies that *A.* was seised in fee, but that he covenanted to stand seised to the use of *B.* where he was seised in tail, and traverses, that *A.* died seised in fee, the deed declaring the uses need not be shewn.

The plaintiff replies, That true it is, *Sir Bartholomew Michael* was seised in fee; but he saith, that being so seised, he, in consideration of the love and affection to *Richard Michael* his nephew and others of his blood, by indenture 25th *March*, 15. *Jac.* 1. covenanted with *Edward Rogers* and others to stand seised of those lands, to the use of himself and the heirs male of his body; and for default of such issue, to the use of the said *Richard Michael* for life, remainder to his first son in tail, with divers remainders over in tail, remainder to the right heirs of the said *Sir Bartholomew Michael*; whereby, and by virtue of the statute of uses, the said *Sir Bartholomew Michael* was seised in tail, with the remainders over, and died seised of such an estate, without issue male: whereupon the said *Richard* entered, and the plaintiff by his licence put in his cattle, &c.; and *traverseth*, that the said *Sir Bartholomew Michael* died seised in fee. Upon this the defendant demurs.

6. Co. 38. Cro. Jac. 70. 217. 673. Hob. 38. Jones, 377. Dyer, 277. Carth. 316. Co. Lit. 6. note (4).

And the principal cause was, Because the plaintiff claiming by this deed of uses, which cannot commence without deed, doth not shew the same.

By 16. & 17. Car. 2. c. 8. after verdict no judgment shall be stayed or reversed for want of alledging the bringing into court of any bond, bill, indenture, or other deed mentioned in the declaration or other pleading; and by 4. & 5. Ann. c. 16. the omission is also aided on a general demurrer.

STOCKMAN *againſt* HAMPTON.

And this being argued divers times at the bar, ALL THE COURT held, that the plea was good without ſhewing the deed.

A deed pleaded only *as inducement* to a traverſe, and not belonging to the party, need not be ſhewn. Co. Lit. 226. 393. 3. Lev. 83. 6. Co. 38. Cro. Eliz. 711. Cro. Jac. 70. 5. Com. Dig. 131.

FIRST, Becauſe the deed doth not belong unto him, although he claims thereby, but to the covenantees, and he hath not any means to obtain the deed; and it ſhould be miſchievous to thoſe who claim under ſuch a deed if they ſhould loſe their eſtates, unleſs they might produce it.

A party claiming under *ceſtui que uſe* need not in pleading ſhew the deed. Ante, 209. Cro. Jac. 109. 317. Lutw. 483. 1. Vezey, 387.

SECONDLY, Becauſe it is an eſtate executed by the ſtatute of uſes; ſo the party is in by the law as tenant in dower, and tenant by ſtatute ſtaple, or merchant, which have a rent-charge extended by them; as 31. *Edw.* 3. "*Menſtrans de faits*," 38. and 35. *Hen.* 6. *ibid.* 118.

An inducement to a traverſe is not traverſable. Ante, 195. Co. Lit. 282. Moor, 428. Hob. 104. Poph. 101. Lutw. 1438. Carth. 99. Cro. Eliz. 671. 890.

THIRDLY, and principally in this caſe, Becauſe it is but an inducement to the traverſe, and is not anſwerable by the defendant; but he ought to maintain his bar, that he died ſeiſed in fee. *Vide* 27. *Hen.* 8. 2. 21. *Edw.* 4. 8. *Plow. Com.* 64.

Whereupon ALL THE COURT agreed, that the replication was good, without ſhewing the deed. Wherefore it was adjudged for the plaintiff. *Vide* 14. *Hen.* 8. 9. *per* POLLARD; 20. *Hen.* 7. 8. *per* FINEUX; 10. *Co.* 92. *Leifeild's Caſe*; *Co. Lit.* 226. 28. *Hen.* 8. *fol.* 29.

CASE 13.

Slocomb's Caſe.

In error, if the declaration and verdict be good, the Court will give ſuch judgment as ought to have been given in the court below; but if bad, they will reverſe the firſt judgment, and alſo adjudge *quòd querens nihil capiat, &c.*; and if the entry be "*ideo conceſſum*" inſtead of "*conſideratum*," it is bad. *Sed vide* Carth. 180. 1. Roll. Ab. 771. 774. Cro. Jac. 4. 107. 386. 632. Hobart, 194. Yelv. 130. 1. Vent. 27. Salk. 24. 262. 402. 2. Bac. Ab. 230. Co. Lit. 39. a. Comp. 843.

ERROR of a judgment in *Bath* in an action for words; where the judgment, after the verdict for the plaintiff, was given for the defendant, intending that the action did not lie for the words; and the entry is, "*ideo conceſſum eſt, quòd querens nihil capiat per* "*billam*;" which was held a manifeſt error; for it ſhould have been, "*ideo conſideratum eſt.*

Then GERMYN, *for the plaintiff* in the writ of error, moved, that judgment ſhould be given for him upon the verdict, and that the declaration is good. And it was agreed by ALL THE COURT, if the declaration and verdict be good, then judgment ought to be given for the plaintiff: whereof JONES doubted at the firſt, but at laſt agreed thereto; for we are to give ſuch judgment as they ought to have given there, ſo as the plaintiff ſhall recover, if the declaration be good.

HYDE now moved, that the judgment in the inferior court was good for the matter, and that the declaration was ill: for he there declared, Whereas ſuch a ſuit was depending in the court of the *Guildhall* in *Exeter*, ſhewing what, *et quòd ſuperinde exitus per patriam fuit junctus*; and at the trial the plaintiff was produced as a witneſs there to prove the iſſue, and was ſworn and gave his evidence upon his oath; that the defendant, having communication with one *Margery Slocomb* of this trial and oath by the plaintiff, ſpake theſe falſe and ſcandalous words of the plaintiff to the ſaid *Margery*, "Thy brother" (*innuendo* the plaintiff, brother of the ſaid *Margery*) "hath taken a falſe oath in ſuch a cauſe" (*innuendo* the ſaid cauſe). The defendant pleaded not guilty; and found for the plaintiff,

plaintiff, and damages and coſts aſſeſſed. The Court upon the matter adjudged, that the declaration was not good.—HYDE aſſigned the cauſe to be, Becauſe he doth not ſhew how iſſue was joined; for he ſaith *ad exitum per patriam*: and though by implication it is to be intended that iſſue was well joined, yet it is not ſo alledged; and then no lawful trial whereto he might be produced as a witneſs.—*Sed non allocatur*: for when it is ſhewn that at the trial he was ſworn, it implies all neceſſary circumſtances, that the iſſue was joined and the jury ſworn; and that to the ſaid jury, upon this iſſue, he gave his evidence. SLOCOMB'S CASE.

THE SECOND EXCEPTION to the declaration, Becauſe in the communication alledged with *Margery Slocomb*, of this oath at the trial he ſaith, "Thy brother" (*innuendo* the plaintiff, brother to the ſaid *Margery*) "hath made a falſe oath, &c." and in all the declaration it is not averred expreſsly that ſhe was his ſiſter, nor that he was her brother, but after the *innuendo*; nor is it averred that he was the ſole brother of the ſaid *Margery*; and that which comes under or after the *innuendo* is not an expreſs averment, nor iſſuable; wherefore the declaration is not good.—ALL THE COURT was of this opinion (*abſente* BRAMPSTON); wherefore it was ordered, that a ſpecial entry ſhould be made, that the firſt judgment ſhould be reverſed for the manner of the entry, "*idco conceſſum.*"

In an action for ſaying, "Thy "brother hath "taken a falſe "oath," it muſt be *averred* that the perſon ſpoken *of* was the brother of the perſon ſpoken *to*; for an *innuendo* to this effect is not ſufficient. Ante, 177.

But becauſe it appeared to the Court that the declaration was inſufficient, it was adjudged here, "*quòd querens nil capiat per billam.*"

4. Co. 17. 20. 1. Roll. Ab. 82. Cro. Eliz. 609. Cowp. 276.

Corbett *againſt* Barnes.

CASE 14.

AUDITA QUERELA by three, to avoid a judgment in this court againſt the ſaid three in treſpaſs; where one of them was only taken in execution upon this judgment, the others not being touched.

A perſon privy to the judgment, and liable to but not in execution, may join in an *audita querela* with him who is in execution.

MAYNARD took exception to the writ and declaration, Becauſe he who was in execution ought only to have had the *audita querela*, and the others, who never yet were grieved, ought not to join with them; and to prove this, he relied upon 35. *Hen.* 6. *pl.* 1. *F. N. B.* 104. 17. *E.* 3. *pl.* 27.—*Sed non allocatur*; for they being parties to the judgment, and liable to the execution, although it was never had againſt them, yet for their indemnity may well have an *audita querela*, and join with him who is in execution.

Jones, 377. 3. Co 14. F. N. B. 103. Co. Lit. 100. 1. Roll Ab. 306. Ld. Ray. 126. 1. Com. Dig. 461.

SECONDLY, He excepted againſt the ſurmiſe in the *audita querela*, that it was not good; which was, Whereas one *J. S.* was ſued in the common pleas for a battery, ſuppoſed to be done in *London*, and by verdict the plaintiff had judgment for thirty pounds damages and coſts; and the ſaid *J. S.* was taken in execution for theſe damages and coſts: and afterwards he and the two other defendants were ſued in this court for this battery, ſuppoſed to be done in the county of *Hereford*, and they three were by verdict and judgment condemned in this court: and it appeared that this action and the action in the common pleas were for one and the ſame battery, and not divers; and that the then plaintiff had acknowledged ſatisfac-

An *audita querela* by three, ſuggeſting that an action of battery was brought againſt one in *London*, and againſt the other two in *Hereford*, is good; for treſpaſs may be laid in any county.

1. Com. Dig. 123.

CORBETT *againſt* BARNES.

tion of the ſaid judgment to *J. S.* in the common pleas, and yet notwithſtanding, againſt law, had ſued to have execution of the ſaid judgment, where he was ſatisfied for the ſame treſpaſs: and hereupon the defendant demurred:

MAYNARD now, *for the defendant* in the *audita querela*, moved, that this cannot be ſurmiſed, Becauſe the one recovery being in *London*, and the other in the county of *Hereford*, it cannot be intended to be one and the ſame battery.—*Sed non allocatur:* for the action, being tranſitory, may be laid in what county the plaintiff will: and it being averred by the record to be one and the ſame treſpaſs, and not divers, &c. and this being confeſſed by the demurrer, the plaintiffs are not ſuch ſtrangers to the record, but that they may have benefit of the ſatisfaction by the ſaid record; and becauſe they are all parties to the act, the law gives liberty to every of them to take advantage of any one of their acts for the other's diſcharge; as if a releaſe were to one of the treſpaſſors, and the other had it to plead, they ſhould take advantage thereof to diſcharge themſelves accordingly. Wherefore it was held, that the ſurmiſe was good, and adjudged for the plaintiffs, unleſs, &c.

CASE 15.

Gryffyth and his Wife *againſt* Lewis and his Wife.

Michaelmas Term, 10. *Car.* 1. *Roll* 397.

A writ of *quod ei deforceat* lies at common law; it is alſo given in certain caſes by the ſtatute of *Weſtminſter* 2. and it alſo lies by the ſtatute of *Rutland* in the courts in Wales; in which laſt caſe it is not neceſſary to recite in the writ the ſpecies of eſtate it is brought to recover. Ante, 178.

S.C. Jones, 380.

ERROR of a judgment in the grand ſeſſion in the county of *Pembroke*, where the plaintiffs had brought a *quod eis deforciant*, and made their proteſtations *proſequi breve illud in formâ et naturâ brevis de quod eis deforciant ad communem legem, ſecundum formam ſtatuti de Rutland, et petunt meſſuagium et terras in R. quæ clamant tenere ſibi et hæredibus de corpore ipſius* MARIÆ, *ut in jure ipſius; et unde dicunt quòd quidam* THOM. BENNET *fuit ſeiſitus in feodo*, and gave thoſe tenements after the ſtatute of 27. *Hen* 8. c. 10. of Uſes, *viz.* 42. *Eliz.* to ſeoffees, to the uſe of the ſaid *Mary* and the heirs of her body, by virtue whereof they entered, and took the *eſplees* within twenty years laſt paſt.

Upon this writ and count the tenants demanded judgment of the writ, becauſe they ſay the ſaid writ is a writ formed by the ſtatute of *Weſtminſter* 2. edit. 13. *Edw.* 1. c. .; by which ſtatute it is provided, "*quòd quicunq. tale breve intulerit, debet in brevi ſuo mentionem facere de ſtatu quem clamat habere in tenementis petitis, &c.*" and in this writ there is not any ſuch mention; *et hoc, &c.*; whereupon they demanded judgment of the writ, &c.; and the demandants thereupon demurred. And IT WAS ADJUDGED there that the writ ſhould abate.

And now this matter was aſſigned for error, and was divers times argued at the bar, and this Term by GLYNN, *for the plaintiff* in the writ of error, and by BEARE, *for the defendant*.—AND ALL THE JUSTICES *ſeriatim* delivered their opinions for the plaintiff in the writ of error, that this writ was good; for it is given by the ſtatute of

GRYFFYTH and his WIFE *against* LEWIS and his WIFE.

of 12. *Edw.* 1. c. . of *Rutland*, called *Statutum Walliæ* (*a*), where this writ, as here, *verbatim*, is ſet down, and there ſaith, that *commune breve quod in aliquo caſu tangit jus, et in aliquo caſu tangit poſſeſſionem*; and in the end of the ſaid writ it is, *et ſimiliter conceditur iſtud breve coram Juſtitiariis de banco, ſi petens voluerit*: and although the ſtatute of *Weſtminſter* 2. c. 4. gives a ſpecial writ of *quod ei deforceat* in ſpecial caſes, where the tenant for life, tenant in dower, or tenant in tail, and ſo by equity where tenant by the courteſy, loſe their lands by recovery by default; and in ſuch caſe the writs make mention of their eſtates; yet this being made *anno* 13. *Edw.* 1. c. . doth not take away the ſtatute of *Wales*, made 12. *Edw.* 1. c. . which gives the *quod ei deforceat*; and this hath been the common practice ever ſince in *Wales*, as in 2. *Edw.* 4. *pl.* 12. by NEEDHAM, who was Juſtice of *Cheſter*, appears. And although in 2. *Edw.* 4. *pl.* 11. it is held, that a *quod ei deforceat* was not at the common law, but was given by the ſtatute *Weſtminſter* 2. BERKLEY and MYSELF denied it; for there was a writ of *quod ei deforceat* at the common law, as appears by 33. *Hen.* 6. *pl.* 46. and 10. *Hen.* 7. *pl.* 9. by FROWICK and by BRACTON, that this writ was given where one is deforced of land: and the YEAR-BOOK of 2. *Edw.* 4. is to be intended, that it was not a *quod ei deforceat* at the common law, where a recovery was by default againſt a particular tenant; for he had not any remedy until the ſtatute of *Weſtminſter* 2. and it is only given by the ſtatute: but in other caſes, upon a diſſeiſin or matter in fact, a *quod ei deforceat* lies; and the ſtatute of *Rutland* proves that a *quod ei deforceat* was at the common law: and although this ſtatute of 13. *Edw.* 1. c. . comes after the ſtatute of 12. *Edw.* 1. c. . which gives the *quod ei deforceat*, that doth not take away the ſtatute of 12. *Edw.* 1. c. . but that he may have a *quod ei deforceat*, and makes his proteſtation *proſequi* in nature of what writ he will; as the ſtatute of 13. *Edw.* 1. c. . which gives the *formedon in deſcender*, doth not take away the cuſtom of *London*, that they ſhall have a writ patent, and ſhall make their proteſtation *proſequi in naturâ brevis de formedon in deſcender et droit cloſe in auncient demeaſn*, or make their proteſtation *proſequi* in nature of any other writ that they will; as *Fitzh. N. B.* and *Old Book of Entries, fol.* 233. & 234. appears. But JONES doubted thereof, whether this writ lies at the common law.

(*a*) See this ſtatute in the Appendix to the 9th vol. of Ruſſhead's edition of the Statutes.

2. Inſt. 358. 2. Saund. 38. 2. Keb. 553. 1. Mod. 70.

2. Inſt. 350.

And although BEARE objected, that if this writ be warranted by the cuſtom of *Wales*, it ought to be ſhewn in pleading, eſpecially to reverſe a judgment—Yet *non allocatur*; for the Court here ſhall take conuſance of their cuſtoms and proceedings, eſpecially being warranted by the ſtatute of *Rutland*. Wherefore it was adjudged for the plaintiff in the writ of error, that the judgment ſhould be reverſed, and that the writ ſhould ſtand, and that the tenants ſhall plead thereto the next Term.—SO NOTE, That for lands in *Wales* there may be pleading here.

A writ of *quod ei deforceat* on the ſtatute of *Rutland* is good, without ſhewing the cuſtom of Wales. Poſt. 56a.

Moyſer

CASE 16.

Moyſer *againſt* Gray, MAYOR OF BEVERLEY.

Michaelmas Term, 11. Car. 1. Roll 500.

A juſtice of the peace may take money *in depoſito* for ſurety of the peace; but the ſheriff cannot receive money from a plaintiff in *replevin* by way of pledges. Poſt. 594. S.C. Jones, 378. 2. Inſt. 340. Dalt. c 119. 2. Eſpin. Dig. 4.

ACTION ON THE CASE. Whereas the plaintiff diſtrained for 7l. 10s. rent, reſerved on a leaſe made to *John at Stile*; and thereupon the ſaid *John at Stile* brought *a replevin* directed to the ſaid mayor, commanding him to accept pledges of *John at Stile*, the plaintiff in the *replevin*, and to deliver the cattle according to the ſtatute of *Weſtminſter* 2.; that the defendant delivered the cattle without finding pledges.

The defendant pleaded, that *John at Stile*, the plaintiff in the *replevin*, delivered to him 3l. 10s. for pledges; which he accepted: and upon this it was demurred.

ROLLE now, *for the plaintiff*, moved, that it was an ill plea; for when he is commanded, "that if the plaintiff find pledges, then he "ſhall deliver," he ought not to take money in lieu of the pledges; for the pledges are found to anſwer the party, if he hath good cauſe of avowry, and to be anſwerable for the amercement to the king, if he be nonſuited, or it be found againſt him: and although he might take money for pledges, yet he ought not to accept of leſs than the plaintiff demands.

And ALL THE COURT held the plea to be vicious for both cauſes: for although, as BERKLEY ſaid, a juſtice of peace may take money to lie *in depoſito* for the ſecurity of the peace, and the money ſhall be forfeited to the king if he doth not keep the peace, yet here it muſt not be ſo, becauſe the party is intereſted to have the benefit of the pledges by a *ſcire facias* if he recover; but he hath not remedy to have the money from the mayor, being in his purſe, if he ſhould have judgment to recover. SECONDLY, The plea is ill, becauſe it is a leſſer ſum than what was demanded: but if the mayor had taken but one pledge (if he had been ſufficient), it had been well enough; but it is at his peril if the pledge be not ſufficient, as it is in *Denbawd's Caſe* (*a*). The ſheriff may take one ſurety for appearance to an arreſt, notwithſtanding the ſtatute of 23. *Hen.* 6. c. . Wherefore, without further argument, it was adjudged for the plaintiff.

Ld. Raym. 278. Fort. 331.

Cro. Eliz. 624. 672. 808. 852. 862. 1. Com. Dig. 489.

(*a*) 10. Co. 502.—See 11. Geo. 2. c. 19. ſ. 23.

CASE 17.

Girling's Caſe.

It is a good juſtification to treſpaſs and falſe impriſonment, that it was in aid and by command of the ſheriff's officer. Jones, 378. 2. Roll. Ab. 561. Cro. Eliz. 181. Cro. Jac. 372. 1. Salk. 409.

FALSE IMPRISONMENT, for aſſault, battery, and impriſonment for ſix days. The defendant pleads to all but to the aſſault, battery, and impriſonment for ſix hours, not guilty; and for the battery and impriſonment for ſix hours he juſtifies, by virtue of a warrant from the ſheriff of *Suffolk* to arreſt him upon a *latitat*, who directed his warrant to the bailiff of —— to execute it, who arreſted the plaintiff, and required the defendant to be aiding to him and to keep him; and therefore he detained him for ſix hours, until the ſheriff diſcharged him; which is the ſame battery and impriſonment, &c. Upon this plea the plaintiff demurs.

2. Mod. 197. Ld. Ray. 230.

A juſtification to treſpaſs under a writ from the ſheriff need not ſtate that the writ was returned. 1. Jones, 378. 2. Roll. Ab. 563. Ld. Ray. 612.

And KERLE ſhews, that the plea is ill, Becauſe it is not pleaded that the writ, being executed, was returned; for the writ is conditional,

tional, *ita quòd habeas corpus* in court *tali die, &c.*: and therefore if the ſheriff himſelf would juſtify, as here, &c. it is no plea, without ſhewing the return of the writ; and the ſheriff's ſervant ſhall not be in a better condition than his maſter ſhould be. GIRLING'S CASE.

Sed non allocatur: for true it is, the ſheriff ought to return his writ, otherwiſe his juſtification is not good; but it is not ſo with his ſervant, for he hath no means to enforce the ſheriff to make return thereof: and that which he did was legally done; and it ſhall not be made illegal by the ſheriff's act in not returning the writ.

SECONDLY, It was objected, that this diſcharge by parol was not good.—*Sed non allocatur*: for the ſheriff may well diſcharge his ſervant by parol, that he ſhall not keep his priſoner any longer; for as he may deliver the priſoner to the ſheriff without more circumſtances, ſo he may be diſcharged by his parol from keeping him any longer. Wherefore it was adjudged for the defendant. The ſheriff may diſcharge his bailiff by parol.

Wilkinſon *againſt* Merryland. CASE 18.

Trinity Term, 10. Car. 1. Roll 1045.

EJECTMENT. Upon a ſpecial verdict the caſe was, One died ſeiſed of divers lands in *A. B.* and *C.* in fee. The lands in *C.* being in him by way of mortgage, and forfeited (*a*), he deviſed the lands in *A.* and *B.* to ſeveral perſons and their heirs, and deviſeth to divers perſons ſeveral legacies, and then adds this clauſe, "All "the reſt of his goods, chattels, leaſes, eſtates, mortgages, debts, "ready money, plate, and other goods whereof he was poſſeſſed, he "deviſed to his wife, after his debts and legacies paid," and made his wife executrix, and died. The wife entered into the land mortgaged, and deviſed it to the defendant and his heirs, and dies. The leſſor of the plaintiff, as heir of the deviſor, enters, and makes the leaſe to the plaintiff, and the defendant actually ouſted him.

The ſole queſtion was, Whether the fee paſſed to the wife by this deviſe, by the name of "all his eſtate, mortgages, &c.?"

And THE COURT held, that no fee paſſed to her. Wherefore rule was given, that judgment ſhould be entered for the plaintiff, unleſs cauſe was ſhewn to the contrary (*b*).

In a deviſe of "all my goods, "leaſes, eſtates, "mortgages, "&c." the word *mortgages* does not extend to paſs an eſtate in fee. *Vide* poſt. 449. Ante, 37. Jones, 380. 1. Roll. Ab. 415. 6. Mod. 100. Powel 153. to 156. 2. Bac. Ab. 55. Gilb. Dev. 24. 12. Mod. 594. 2. Vern. 625. Cowp. 306. Dougl. 759. 3. Term Rep. 356.

1. Term Rep. 411. 2. Term Rep. 456. 653. 1. H. Bl. Rep. C. B. 1.

(*a*) In the abridgment of this caſe 1. Roll. Abr. 834. it is not ſtated that the mortgages were forfeited. See alſo poſt. 450.

(*b*) It was moved again, and adjudged for the plaintiff. See poſt. 449.

Blague *againſt* Gold. CASE 19.

TRESPASS. Upon a ſpecial verdict it was found, That *Peter Blague* was ſeiſed in fee of two houſes in *Andover*, the one called "THE CORNER-HOUSE," in the tenure of one *Binſon* and *Nott*, and of another houſe thereto near adjoining, in the tenure of *Hitchcock*. He deviſeth his houſe called THE CORNER-HOUSE, in *Andover*, in the tenure of *Binſon* and *Hitchcock*, to *J. S.* in fee.

The queſtion was, Whether the houſe in the tenure of *Hitchcock*, adjoining to the corner-houſe, ſhall paſs or no?

And IT WAS RESOLVED, that it ſhall not, but only the corner-houſe, in the occupation of *Binſon* and *Nott* (if they occupy jointly) A deviſe of a houſe called "*The Corner-houſe*," in the tenure of *A.* and *B.* is a ſufficient deſcription to paſs the houſe, although it be in the tenure of *A.* only. Ante, 130. S.C. Jones, 379. Powel on Deviſes, 437.

1. Roll. Ab. 613. Cro. Eliz. 113. 4. Mod. 132. 141. 1. Salk. 225. 235. 1. Vezey, 416. Cowper, 363. 808. Dougl. 762. 2. Term Rep. 498.

ſhall

Brague against Gold.

shall pass; but if they occupy severally, *viz.* one part in the tenure of *Binson*, and the other part in the tenure of *Nott*, severally, then only that in the tenure of *Binson* shall pass, and not the residue in the tenure of *Nott*. Wherefore rule was given, unless other cause were shewn to the contrary, that judgment should be for the plaintiff (*a*).

(*a*) This case was moved again in Trinity Term, 13. Car. 1. and judgment given for the plaintiff. Post. 473.

Case 20.

Bumpsted's Case.

Quod vide ante, page 418.

Justices of the peace cannot *enquire, try*, and *determine* offences on one and the same day.
Ante, 325. 340. 438.
Post. 583.
S.C. Jones, 379.
2. Roll. Ab. 615.
1. Sid. 99. 335.
Cro. Jac. 404.
2. Inst. 568.
4. Inst. 164.
4. Com. Dig. 156.
2. Hawk. P. C. 571.
3. Bac. Ab. 259.

THIS Case was now moved again by KEELING, *junior*; and he insisted upon for error, That neither justices of peace, nor Justices of *oyer* and *terminer* might enquire, and take traverse, and determine indictments the same day; but Justices in *eyre* and gaol-delivery might, because there is warning given long before of their coming, and the offenders may know what matters are determinable there: and there is a precept for jurors to come out of all parts of the county to try and determine offences before committed, whereof the prisoners may take cognizance; and it is for the speedy delivery of the prisoners; and for this reason compared to the proceedings in this court, which is as the general *eyre*; as 27. *Assise*, 1. Where the proceedings are for offences committed in the county of *Middlesex*, this court is as *eyre*, to proceed *de die in diem*, and to award *venire facias'* returnable the next day, or at another day after, according to their appointment, without regard of fifteen days betwixt the *teste* and return; but if any indictments be removed out of *London*, or out of the sessions of the peace in *Middlesex*, by *certiorari*, or out of any other county, where the defendant is to plead here to the issue, the usual course is to award a *venire facias*, and to have fifteen days betwixt the *teste* and return: *à multo fortiori* in the sessions of the peace, or before justices of *oyer* and *terminer*. And for this point, VIDE 4. *Hen.* 5. "*Enquest*," 5. by HANKFORD, 22. *Edw.* 4. "*Coron.*" 44. 2. *Hen.* 8. *pl.* 159. in *Kelloway, Staunforde*, 156.—ALL THE COURT was of this opinion, that justices of peace may not enquire, try, and determine civil offences in one and the same day; for the party ought to have a convenient time to provide for the trial.

Where *damages* are given by statute to the party grieved, they cannot be recovered on an *indictment*, unless that mode be expressly pointed out; but must be sued for by action on the statute.
Jones, 380.
2. Roll. Ab. 220.
Cro. Jac. 643.
2 Hawk. P. C. 301.
2. Hale, 174.

THE SECOND ERROR assigned was, That they awarded to the one treble damages, *viz.* where he took twenty shillings *extorsivè*, they awarded to the party three pounds, and forty pounds fine to the king; and upon the other indictment, where it was found that he took six shillings eightpence *extorsivè*, they awarded, that he should pay to the party for damages 26s. 8d. (so a quadruple value) and twenty pounds fine to the king;—which ALL THE COURT clearly held to be erroneous: for although by colour of the statute of 23. *Hen.* 6. c. 10. where treble damages are given to the party, they might assess them, yet it is here undue and erroneous; for they ought first to have enquired of the damages, for peradventure it may be more or less, according to the circumstances; but they may not assess themselves without enquiry by the jury, for the jury ought to have found the damages, and then they might treble them; and for the other quadruple damages, it is without colour: and out

1. Burr. 515. 4. Com. Dig. 156. 2. Bac. Ab. 12.

of

of the ſtatute: and the indictment is not *contra formam ſtatuti*, as it ought to have been, if they would proceed upon the ſtatute. BUMPSTED'S CASE.

ALSO, it is doubtful whether this ſtatute extends to *extortions*, unleſs taken upon arreſts; for the ſtatute doth not ſpeak but of arreſts, and extortions taken upon them. But THE COURT reſolved not this point. Qu. If 23. *Hen.* 6. c. 10. extends to extortions, except upon arreſts.

But for the ſaid two former errors the judgment was reverſed. 1. Hawk. P. C. 316.

Bell's Caſe. CASE 21.

BELL was indicted, That he feloniouſly, 8. *Jac.* 1. ſtole a ſilver ladle of plate from KING JAMES, whereas in truth it was the plate of QUEEN ANNE, and ſtolen from her; for which he obtained his pardon by the queen's means. He was now indicted again for ſtealing the ſame plate; and, Whether he ſhould have the benefit of the general pardon of 21. *Jac.* 1. without pleading it and praying a diſcharge, becauſe there is a ſpecial exception in the pardon of goods taken away, purloined, or ſtolen from the king? was the queſtion.—HENDEN moved, that this exception is to the taking away of goods, &c. as treſpaſſor, whereby the property of the goods is ſaved to the king, and doth not except the felony;—but THE COURT doubted hereof: whereupon they adviſed him to plead. YEAR-BOOKS 26. *Hen.* 8. *pl.* 7. 4. *Hen.* 7. *pl.* 8.

A general pardon where there are exceptions muſt be pleaded with the uſual averments. Ante, 32.

Dyer, 85. Cro. Jac. 149. Shower, 100. 1. Lev. 26. Plowd. 103. 484. 8. Co. 68. Hardres, 367. Carth. 132. S. P. C. 103.

2. Leon. 28. 3. Inſt. 234. Cro. Eliz. 153. 768. 778. Lane, 71. 2. Wilſ. 214. 3. Bac. Abr. 868. 2. Hawk. P. C. 561.

Wilkinſon *againſt* Merryland. CASE 22.

Ante, Page 447.

THIS Caſe was now moved again by DENN, *an apprentice of the law*; and he urged ſtrongly that an eſtate in fee paſſed: for inaſmuch as he had diſpoſed of divers of his lands to his brothers and their heirs, and divers perſonal legacies to them and to others, but of thoſe lands in queſtion (being mortgaged to him and his heirs, and forfeited) he had not made any diſpoſing, he deviſing the reſidue of all his goods, leaſes, eſtates, mortgages, &c. to his wife, all the eſtate which he had in the mortgage (which is a fee ſimple) paſſed thereby; for it being in a will, ſhall paſs according to his intent, as deviſe of land *in perpetuum* ſhall paſs the fee (*a*). And the caſe in *Dyer* (*b*), deviſe of the fee ſimple of his houſe in *Soper-lane* to his wife a fee paſſed without the word "*heirs*," and other caſes to that purpoſe, to ſhew that a fee paſſed by the intent of the deviſor without the word *heirs* (*c*).

A deviſe of "all "my goods, "leaſes, eſtates, "mortgages, "&c. whereof I "am poſſeſſed," will not paſs a fee ſimple which the teſtator had by way of mortgage and forfeited, unleſs he had mentioned that he had ſuch an eſtate. *Vide* ante, 37. 369. 447.

But JONES and MYSELF continued our former opinion, that no fee paſſed. But the greater queſtion would have been, Whether an eſtate for life had paſſed to the wife if ſhe had been alive? becauſe it is coupled only with perſonal things, as "goods, leaſes, eſtates,

12. Mod. 594. Prec. in Ch. 471. Noy, 48. Powel on Mort. 153. 10 157. Comp. 238.

1. Eq. Ca. Ab. 211. 2. Vernon, 625. Raym. 453. 3. Com. Dig. 24. 2. Atk. 102. 3. H. Bl. Rep. C. B. 3. 1. Term Rep. 411. 2. Term Rep 656. 3. Term Rep. 356.

(*a*) Ante, 139. See alſo Jones, 195. 1. Roll. Abr. 834. Co. Lit. 9. b. 4. Inſt. 324. and Year-Book 40. Hen. 7. pl. 7.

(*b*) 19. Eliz. p. 357.

(*c*) See Bendlow, 9. 1. Roll. Abr. 834. 6. Mod. 110. Moor, 57. 2. Wilſ. 6. 2. Atk. 71. Cro. Eliz. 204. 3. Com. Dig. 25.

"mortgages,

WILKINSON *against* MERRYLAND.

"mortgages, debts, &c." which may be intended, that he meant only but eſtate for years, or mortgages for years; and ſo much the rather by reaſon of the words, "whereof I am poſſeſſed."—And BERKLEY, *Juſtice* (who was abſent the day before), concurred in opinion; for the heir ſhall not be diſinherited, nor the fee paſſed away without an apparent intent out of the words of the will. And in this caſe it doth not appear that he intended to paſs but ſuch things whereof he was poſſeſſed, which extend only to things perſonal, or leaſes, whereof he is *poſſeſſed*, and not to freehold, whereof he is ſaid in law to be *ſeiſed*. And peradventure he was not poſſeſſed of this land; for it is not found, that the mortgagee entered and was in poſſeſſion: and commonly in mortgages, the mortgagor retains the poſſeſſion until the mortgagee enters for a forfeiture.—Wherefore it was appointed, that judgment ſhould be entered for the plaintiff. But they agreed, if he had deviſed "all "his eſtate in ſuch land," or had mentioned that he had ſuch land mortgaged in fee, and deviſed "his mortgage," the fee had paſſed.

Ante, 369.

Ante, 37.

CASE 23.

Cleve *againſt* Veer.

Trinity Term, 11. *Car.* 1. *Roll*

If the conuſee of a *ſtatute ſtaple* die, and his executor ſues an *extent* in chancery, but before execution executed the executor dies, and adminiſtration *de bonis non* is granted to *C.* who continues the proceſs, and after the *extent* returned ſues out a *liberate* of the conuſor's lands, which are taken in execution upon the *extendi facias* brought by the executor of the conuſee, and has them delivered to him; the *extent* is void, and the conuſee may recover the lands back by an action of *ejectment*.

Jones, 385. 2. Roll. Ab. 467.

EJECTMENT on a leaſe by *Edward Dobbs* of lands in *Duſſborn Abbots*, in the county of *Glouceſter*. Upon not guilty pleaded,

A ſpecial verdict was found, that the ſaid *Edward Dobbs* was ſeiſed in fee tail of that land, and being ſo ſeiſed, was bound in a recognizance, in the nature of a ſtatute ſtaple, according to the 23. *Hen.* 8. c. 6. acknowledged before SIR HENRY HOBART, *Chief Juſtice* of the common pleas, in eight hundred pounds, to *William Blythe*: that he, the ſaid *William Blythe*, 21. *Jac.* 1. made *Elizabeth Throgmorton* his executrix, and died, 1ſt *July*, 1. *Car.* 1.: that the ſaid executrix proved the will; and for the ſaid eight hundred pounds, 9th *July*, 1. *Car.* 1. ſued out of the chancery an *extendi facias* returnable in chancery *Octabis Michaelis*: that afterwards, and before the return of the writ, *viz.* 17th *Auguſt*, 1. *Car.* 1. the ſaid *Elizabeth* the executrix died: and that 22d *September*, 1. *Car.* 1. the ſheriff *virtute brevis prædicti cepit inquiſitionem*, whereby was found, that the ſaid *Edward Dobbs* was ſeiſed in fee tail to him and the heirs males of his body, of the ſaid tenements in queſtion, at the time of the recognizance, of the annual value of 14l. 4s. 10d. and at the day returned this inquiſition into chancery. They find, that on the 19th *Auguſt* 1625, which was in 1. *Car.* 1. adminiſtration of the goods of *William Blythe*, not adminiſtered by *Elizabeth Throgmorton*, who died inteſtate, were committed to *Robert Throgmorton*, who, 22d *May*, 2. *Car.* 1. obtained a *liberate* out of the chancery to have the ſaid lands delivered to him the ſaid *Robert Throgmorton*, adminiſtrator, which was returned: that 2d *June*, 2. *Car.* 1. the ſheriff delivered the ſaid lands to the ſaid adminiſtrator, *tenendum*, according to the ſaid extent; whereby he entered and was ſeiſed *prout lex*, &c.: and that the ſaid *Edward Dobbs* entered and let to the

the plaintiff, *prout* in the declaration, whereby he entered and was poſſeſſed, until the defendant, as ſervant to the ſaid *Robert Throgmorton* the adminiſtrator, ouſted him; and if, &c. CLEVE *againſt* VERN.

BULSTRODE and ROLLE, upon this ſpecial verdict, argued at the bar, that this extent and *liberate* were void; for the extent being ſued by the executrix upon the ſtatute made to her teſtator, and ſhe dying before the inquiſition taken, the inquiſition taken after the death of her who ſued it was void: for the writ is to appriſe and ſeize into the hands of the king *ut ei liberari faciamus* to the ſaid executrix; and ſhe being dead before the ſaid inquiſition was taken (ſo as it cannot be delivered unto her), the inquiſition taken after and returned is void: and for this they relied upon 36. *Hen.* 6. *Bro. tit.* "*Statute Merchant*," 43.

SECONDLY, It was objected, admitting this extent be not void for that cauſe, yet the *liberate* is not well executed to deliver it to the adminiſtrator; for the executrix ſuing it as executrix to *William Blythe* the teſtator, and ſhe dying inteſtate, this writ is ſued by the adminiſtrator, who comes *paramount* her, and claiming immediately from the firſt inteſtate, cannot upon this extent ſued by the executrix have the *liberate*; but he ought to commence *de novo*, and procure a new certificate, and a new extent and *liberate*: and compared it to 26. *Hen.* 8. *pl.* 7. and the caſe 23. *Hen.* 8. cited 1. *Co.* 96. in *Shelley's Caſe*, that if an executor ſue a debtor upon an obligation made to his teſtator, and recover, and die inteſtate, the adminiſtrator of the firſt man cannot have a *ſcire facias* upon this judgment (*a*), becauſe he comes in *paramount* the executor who recovered, but he ought to begin *de novo*: and alſo compared it to the caſes of a *ſtatute merchant*, where the conuſee procures it to be certified into the chancery, and a *capias* thereunto returnable into the common pleas (as is uſual), or into the king's bench (*b*), and the conuſor is returned *non eſt inventus*, and after the conuſee makes his executor, and dies before the execution made by *extendi facias*, his executor may not have an *extendi facias*, but ought to have a new certificate out of the chancery, and a new *capias*, as it is *F. N. B.* 131. *Dyer*, 180. 17. *Edw.* 3. 31. 25. *Edw.* 3. 2. Ante, 167. 208. 227. 1. Sid. 29. Poſt. 457.

JONES and BERKLEY, *Juſtices*, held, that for both cauſes the *liberate* was not well executed, but void.

But *I* held the contrary: yet to the firſt *I* agreed, that if an extent be taken in the name of one who is dead before the *teſte* of the writ it is void, according to the ſaid YEAR-Book of 36. *Hen.* 8.; but where an extent is ſued, and the party who ſues it dies after the *teſte* of the writ, and before the inquiſition taken, in that caſe the ſheriff ought to enquire what lands the conuſor had at the time of the recognizance acknowledged, and to make enquiry of the value of them, and to ſeize into the king's hands, and return them into chancery: and the ſheriff is not bound to take notice of the party's death who ſued it, for he is only to execute and return his writ: but if execution be ſued in the name of one who is dead, before the

(*a*) But ſee now 30. Car. 2. c. 6. by which this caſe is provided for. (*b*) F. N. B. 130. 2. Vent. 326. 5. Com. Dig. 591.

teſte,

CLEVE *againſt* VAER.

teſte, it is merely falſe and void; and upon this if the party be taken, he ſhall have remedy by *audita querela*, or otherwiſe, as the caſe requires.

Poſt. 459. 5. Co. 9. b.

SECONDLY, *I* held, that the *liberate* was well executed at the ſuit of the adminiſtrator; for *I* agreed the caſes, that an adminiſtrator ſhall not have a *ſcire facias* upon a judgment obtained by an executor, becauſe he comes *paramount* that judgment, and is not privy thereto; and that if a teſtator procures a certificate upon a ſtatute merchant, and a *capias* is returned into the common pleas, and the teſtator dies after the return, and before the *extendi facias* awarded, the executor muſt have a new certificate and a new *capias*, and ſhall not have an *extendi facias* upon the *capias* returned, becauſe he is another perſon and in another court; but upon a ſtatute ſtaple, or a recognizance upon the 23. *Hen.* 8. c. 6. in nature of a ſtatute ſtaple, a certificate being made and delivered into the hands of the clerk of the crown in chancery, in that caſe, by a warrant from the lord keeper, he ſhall have an *extendi facias* thereupon; for this being executed and returned, is delivered unto the petty bag: and although he who procured it be dead, yet being all in one court, and appearing on record, it is not the courſe to have a new certificate and extent; but the executor or adminiſtrator, upon his oath in chancery, and ſhewing of the teſtament or letters of adminiſtration, ſhall have a *liberate*, without being put to a new certificate and new extent, becauſe it is all in one and the ſame court.

THE CLERK OF THE PETTY BAG ſaid, It is the uſual courſe in chancery when there is an *extendi facias* upon a ſtatute ſtaple, or a recognizance in nature of a ſtatute ſtaple, at the ſuit of one who dies, that the executor or adminiſtrator, upon his oath that he who ſued it is dead, is to have a *liberate* reciting the former extent. And of this BRANSTON doubted.—*Et adjournatur* (*a*).

(*a*) It was moved again, and judgment given for the plaintiff. Poſt. 457.

CASE 24.

King and his Wife *againſt* Fitche.

Ante, *Page* 414.

In waſte in a houſe and gardens, if the jury find *ſmall damages* in one place only, the Court will adjudge it *no waſte*. 1. Roll. Ab. 786. Cro. Jac. 31. Winch, 5. Bull. N. P. 120.

ERROR of a judgment in *waſte*.—BABINGTON aſſigned for error, (which was not any of the errors aſſigned in the record), That judgment being given by default in a writ of waſte, made *in domibus, gardinis, et pomariis*, aſſigning the waſte to be done in the houſes in divers places, and in the orchard, in cutting down of twenty apple-trees; and upon the writ of enquiry of waſte, the waſte being found to be in cutting down of two apples-trees, &c. *et quòd nullum aliud fecerunt vaſtum*; that this finding is imperfect.

In waſte in houſes, gardens, orchards, a verdict finding waſte in one place only is bad; but in waſte for cutting twenty trees, a finding that two trees were cut is good. Co. Lit. 355. Winch, 5. Lutw. 1547. 1. Term Rep. 56.

SECONDLY, Becauſe waſte is found in cutting down two apple-trees, and that the plaintiff ought to be *in miſericordiâ* for the reſidue, which is not ſo entered; therefore error: for the precedents are, that where waſte is found in part, *et quòd nullum aliud fecerunt vaſtum*; as where waſte is aſſigned in cutting down twenty trees,

and

and the jury find that he cut down but two trees, or leſs than the plaintiff aſſigned, the plaintiff ſhall be *in miſericordiâ*.

KING and his WIFE *againſt* FITCHE.

In an action of waſte for cutting down twenty trees, if the verdict be found for the plaintiff as to two trees only, yet he ſhall not be *amerced* for the reſidue.

BERKLEY, *Juſtice*, held, that it is here good enough; for true it is, there is a diverſity where the writ of waſte and the count is *in domibus, boſcis, et gardinis*; and upon the writ of enquiry of waſte the waſte is found *in domibus et gardinis*, and nothing *in boſcis*; there the plaintiff ſhall be amerced, becauſe he counts for waſte in places where no waſte was committed in the one of them: but where waſte is aſſigned in cutting down twenty trees, and the waſte is found in cutting down two trees, and ſo varies only in quantity, it is otherwiſe. But JONES and MYSELF doubted thereof.

Ante, 178.—14. *Edw.* 3. pl. 27. 22. *Edw.* 3. pl. 1. Hobart, 53. Dyer, 75. 115. Palm. 270. Cro. Jac. 630. 5. Co. 49. 8. Co. 61. Co. Ent. 620. Cro. Eliz. 257. 1. Roll. Abr. 217. 1. Sid. 232. 2. Mod. 198. 4. Com. Dig. 178.

12. Car. 1. In the King's Bench.

Sir John Bramſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Humphrys *againſt* Knight.

CASE 4.

Trinity Term, 7. *Car.* 1. *Roll* 772.

EJECTMENT. Upon a ſpecial verdict, and not guilty pleaded, the caſe appeared to be,

A freeman and citizen of London may, by the cuſtom of the city, deviſe lands in *mortmain* without licence. Ante, 248. Poſt. 517. 576. S.C Jones, 387. Priv. Lond. 156. Co. Lit. 21.

Robert Coldham, citizen and freeman of *London*, being formerly ſeiſed in fee of ſix meſſuages, in the pariſh of *St. Mary Magdalen*, deviſed thoſe tenements by his will in writing, 6. *Hen.* 7. to the parſon and churchwardens of the pariſh of *St. Mary Magdalen*, and their ſucceſſors, to the intents and purpoſes following, *viz.* that the churchwardens of the ſaid pariſh ſhould receive the profits of the ſaid tenements; and that ten marks yearly of the profits ſhould find a chaplain for ever, to ſing every day at the altar of the ſaid church, and to pray for the ſouls of him and his anceſtors; and to find an anniverſary there, and to expend thereupon thirteen ſhillings and fourpence yearly: and the reſidue of the profits thereof to be employed about the reparations and church. And they found the cuſtoms of *London*, that "the parſon and churchwardens "are a corporation, to purchaſe to the uſe of their church;" and that "a freeman and citizen of *London* may deviſe lands in mort-"main." And they further find, that ever ſince the ſaid will, the ſaid ten marks *per annum* were employed accordingly for the finding of a chaplain, and the 13s. 4d. *per annum* for the maintenance of an anniverſary, until the making of the ſtatute of 1. *Edw.* 6. c. .: and that a quit-rent of 42s. *per annum* was iſſuing out of the ſaid tenements at the time of the will and ſtatute, and paid to the king: and that the tenements deviſed at the time of the will, and until the ſaid ſtatute, were of the annual value of 9l. 4s. and no more, yearly: that the lands were ſeiſed into the hands of king *Edward* the ſixth, and by him granted away to *J. S.* under whom the defendant claims; and under the parſon and churchwardens the plaintiff claims as leſſee.

The ſole queſtion was, Whether theſe tenements were given by the ſaid ſtatute to the king? And it was reſolved, that theſe lands were given to the king.

Lands deviſed to the parſon and churchwardens of a pariſh, and that they ſhall pay 10l. a-year out of the profits to find *a prieſt*, and the reſidue to be employed in the repairs of the church, are given to the king by the ſtatute againſt ſuperſtitious uſes.

GRIMSTON objected, that the land was not given for the maintenance of a prieſt, but only a certain ſum of 6l. 13s. 4d yearly; for the land being appointed for the reparation of the church with the reſidue of the profits thereof, it being a good uſe, ſhall ſave the land.

Yet THE COURT, after argument at the bar, held, that foraſmuch as it was but the reſidue, *ſi quid fuerit*; which is uncertain, if any ſhall be or no; and it appears by the verdict, that the land was charged with a quit-rent of 42s. yearly, and the ſuperſtitious uſes amounted to 7l. 6s. 8d.; and that at the time of the will, and until the ſtatute, the land was valued but at 9l. 4s. yearly, and no more; and that the profits employed with the quit-rent appeared to amount to 9l. 8s. 8d. which was 4s. 8d. more than the land yearly yielded, and ſo no reſidue, therefore to be within the words and intent of the ſtatute, that is to ſay, the firſt and third branch; and that the principal cauſe of this gift is the maintaining of a prieſt and an anniverſary, and wherewith and whereby a prieſt and an anniverſary were maintained (*a*). And although it hath been objected, there may be improvement expected of the houſes, there being ſix houſes, it was thereto anſwered, that is not to be intended; for the value is to be regarded as it was at the time of the will making, at leaſt as it was at the time of the making of the ſtatute of 1. *Edw.* 6. c. . and a greater value ſhall not be expected: and if it were of a greater value after, it is not conſiderable; for it is to be reſpected as it was at the time of the ſtatute made, as 6. *Edw* 2. "*Voucher*," 258. 19. *Hen.* 6. *pl.* 46. vouchee ſhall not render in value more than it was at the time of the warranty; and the value of the land is to be reſpected as it is *ultra repriſas*. And the caſe of *Drake v. Hill*, adjudged 8. *Car.* 1. in the common pleas, was cited, that the eight pounds value of a church ſhall be according as it is valued in the valuation of the benefices, and not according to the true value as it is upon improvement, although diverſity of opinions have been therein before; for the ſtatute intends as it was valued in the ancient book of firſt-fruits and tenths, which was taxed 29. *Edw.* 1.; and after, when another valuation was made, 26. *Hen.* 8. then according to that valuation. Wherefore this land being charged with a quit-rent of 42s. the reſidue not amounting to the value appointed for the ſuperſtitious uſes, it was adjudged for the defendant. *Vide* 43. *Edw.* 3. *pl.* 8. 27. *Edw.* 3. *pl.* 1. 7. *Hen.* 3. "*Dower*," 192.

Ante, 249.
4. Co. 114. a. 2. Vern. 266. Moor, 131. 264. 694.
Latch. 38.
1. Roll. Rep. 417.
5. Com. Dig. "Uſes," (M).
1. Bl. Com. 392.

(*a*) See for this 4. Co. 110. 112. Adams and Lambert's Caſe.

CASE 2.

Pew and his Wife *againſt* Jeffryes.

"A Welſh *jade*," if underſtood in the language of the country to mean "Welſh "*whore*," are words of ſpiritual cognizance; but "Welſh *thief*" ſeems cognizable by the common law.

SUIT being in the ſpiritual court for calling the wife "*Welſh* "*jade* and *Welſh rogue*," and ſentence being there in the arches, the defendant appealed to the court of audience. The appeal mentioned the former words; and in the libel was interlined, "and a "*Welſh thief*."

Hereupon

Hereupon a *prohibition* was prayed and granted, unless cause were shewn by such a day to the contrary: for it was held clearly, that for the words "*Welsh thief*" action lies at the common law, and they ought not to sue in the spiritual court; and for the other words, it was conceived, upon the first motion, they ought not to sue in the spiritual court, for they are words only of heat, and no slander.

Pew and his Wife *against* Jeffreys.

But it was afterwards moved and shewn, that the words "*a Welsh* "*thief*" were not in the first libel, nor in the appeal at the time of the appeal, but were interlined by a false hand, without the privity of the plaintiff, in the spiritual court; and that upon examination in the spiritual court, it was found to be falsely inserted and ordered to be expunged: and that the words "*Welsh jade*" were shewn in the libel to be expounded, and so known to be, a "*Welsh whore*;" which being a spiritual cause and examinable there, it was therefore prayed, that no *prohibition* should be granted; and if *a prohibition* was issued forth, that *a consultation* might be awarded.

Ante, 110. 394.

The Court was of that opinion; for the words "and *a Welsh* "*thief*" being unduly interlined, and by authority of the spiritual court expunged, and in the spiritual court "*jade*" being known and expounded for "*a whore*," and especially being after two sentences in the spiritual court, that the common law ought not to intermeddle therewith: wherefore *consultation* was granted, if any prohibition was issued forth *quia improvidè*; and rule given, that if *a prohibition* was not passed, that none should be.

R. 177. 765.

Cleve *against* Veer.

Case 3.

Ante, Page 450.

This Case was now moved again, *absente* Brampston.

Jones and Berkley argued, that this extent made after the death of the conusee was merely void; for by the conusee's death, as Berkley said, the writ of extent is abated *in facto*, and that the sheriff hath not any authority to extend the lands: for the writ is, that he shall extend and seize into the king's hands *ut ei liberemus*; and when he is dead, there is not any warrant to deliver them to his executor or administrator; for it is particular *ut ei liberemus*, and he is not to deliver it to any other: and compared it to the cases 25. *Edw.* 3. *pl.* 2. 18. *Edw.* 3. *pl.* 10. and *Dyer*, 180. that if a conusee of a statute merchant procure a certificate upon the statute, and thereupon a *capias* returnable in the common pleas or king's bench, and the *capias* being returned *non est inventus*, the conusee dies before another execution is awarded, the executors might not have execution, but were directed to bring a new certificate and a new *capias* out of the chancery.

If an executor sue out an *extent* upon a statute staple acknowledged to his testator, and die before the return of the writ, and the administrator *de bonis non* sue out a *liberate*, both the *extent* and *liberate* are void. Ante, 451.

1. Jones, 385. 1. Roll. Ab. 786. 2. Roll. Ab. 467. Cro. Eliz. 440. Ld. Ray. 1076. 1. Bl. Rep. 67.

Secondly, Berkley held, that if the extent had been well returned, yet the administrator coming *paramount*, the executor cannot have the benefit thereof, as 29. *Hen.* 6. *pl.* 7.

Cleve against Vear.

JONES was of the same opinion, and cited the case of *Beamond v. Long* (*a*) in this court.

Also BERKLEY said, that as the verdict is found, the plaintiff ought not to have judgment; for it is an ejectment of the capital messuage, *sive situm manerii de B.* and one hundred and twenty acres of land, one hundred of pasture, &c. in *B.*; which declaration is not good for the messuage because it is in the disjunctive, but it is good for the land, and there is no title found for the defendant for the land: for the verdict finds, that the said *Edward Dobbs*, the lessor and the consusor, was seised in tail of the manor of *B.* at the time of the recognizance, and that this manor was delivered in extent; but he doth not say that the land in the declaration was parcel of the said manor; and so it is not found that this land was delivered in extent, and then the defendant hath no title.

Cro. Eliz. 828. Ante, 22. 130. 391. Cro. Jac. 175.

But JONES agreed with ME, that this is not material; for being in a special verdict, it is intended, otherwise there would be no cause of a special verdict (*b*).

So for the matter JONES and BERKLEY agreed, that judgment should be given for the plaintiff.

But *I* argued to the contrary, because this extent upon the statute is in nature of a *statute staple*, where all the proceedings are in chancery, and not like to executions upon statutes merchants, where the beginning is upon a certificate made in the chancery, and a *capias* is awarded returnable in the common pleas or king's bench; for there peradventure, as the case is 18. *Edw.* 3. 10. and *Dyer*, 180. where the consusee dies before execution, the executor shall not proceed in the execution, upon *non est inventus* returned, without a new writ out of the chancery, because it is their warrant to proceed in the common pleas; but an extent upon a statute staple, and the proceedings thereupon, are all in the chancery; and then, although the consusee dies betwixt the writ of extent and the return thereof, yet being but a preparation unto the execution upon his cognizance, what lands are extendable and the value of them, and to seize them into the king's hands *ut ei liberemus*, none hath answered to it; and it being returned there, it is in vain to have a new inquisition, it being all of record in the same court.

5. Com. Dig. 170.

SECONDLY, Although the consusee dies before the return of the writ, there being a good inquisition, it is well enough: and although it be an inquisition after the death of the consusee, yet it is good enough; for the sheriff did that which the writ enjoined him, *viz.* to enquire what lands the recognizor had at the time of the recognizance acknowledged, or after, of what annual value, and to seize them into the king's hands *ut ei liberemus*, that is only to shew the king's intent; and the seizure into the king's hands makes not any title to the king, nor puts the possession in him, but is only matter of form, as it is in 3. *Edw.* 6. 67. 'Although an inquisition be after the death of the consusee, yet it is as good as if it had been in his life; for the sheriff may not take notice of the

16 Hen. 3. Mill.

(*a*) Ante, 208. 227. (*b*) See for this point Goodall's Case, 5. Co. 97. a.

death

death of the conuſee, but he ought to return how he ſerved the writ; and if he return that the conuſee is dead, he ſhall be amerced,' as 10. *Hen.* 4. *pl.* 5. & 7. and 32. *Hen.* 6. *pl.* 28. are: and there is a difference betwixt a judicial writ after judgment to do execution and a writ original; for the writ judicial to make execution ſhall not abate, nor is abateable by the death of him who ſues it; as it is the common courſe if a *capias ad ſatisfaciendum* or a *fieri facias* upon judgment iſſueth, the ſheriff ſhall execute it although the party who ſued it died before the return of the writ: and although the death be before or after the execution, if it be after the *teſte* of the writ, it is well enough; as where a *capias ad ſatisfaciendum* is ſued, and the party taken before or after the death of him who ſued it, and before the day of the return; or if a *fieri facias* be awarded, and the money levied by the ſheriff, and the plaintiff dies before the day of the return of the writ, yet the executor or his adminiſtrator ſhall have the benefit, and is to have the money: and it is no return for the ſheriff to ſay that the plaintiff is dead; and therefore he did not execute it.'

CLEVE *againſt* VERE. 6 Mar. & W. 130

And for the ſecond point *I* argued, Becauſe it is not a ſuit by way of action, as a *ſcire facias* or debt, which *I* agreed the adminiſtrator ſhall not have, upon a judgment obtained by the executor, becauſe he comes *paramount*, the executor (*a*); yet this being no ſuit, but the praying of a *liberate* upon the ſhewing of the letters of adminiſtration, the adminiſtrator may well have it; and he is the party who hath the privity to demand it, for the benefit of the inteſtate: and if the executor had had the extent well executed, and the *liberate* thereupon well delivered, and were in poſſeſſion thereof, and died inteſtate, the adminiſtrator of the firſt man, in whoſe right the extent was ſued, ſhould have it, as JONES agreed afterwards in his argument; ſo where it is only to demand delivery, he may do it well enough.

Ante, 451, 2.

But notwithſtanding theſe reaſons, JONES and BERKLEY appointed (BRAMPSTON, *Chief Juſtice*, being in the court of wards), that judgment ſhould be entered for the plaintiff; for JONES ſaid, that BRAMPSTON delivered to him his opinion for the plaintiff, becauſe the extent taken after the death of the conuſee, although it was returned in the chancery at the day of the return of the writ, was merely void; and ſo the defendant had not any title thereby. Wherefore judgment was entered accordingly for the plaintiff.

(*a*) *Vide* 1. Co. 96. and Brudnel's Caſe, 5. Co. 9.

Webb *againſt* Nicholls.

CASE 4.

ERROR of a judgment in the common pleas, in an action on the caſe for words; where *Nicholls* declared, That he was an attorney in the common pleas, and ſo had been for fifteen years: and whereas one *Humphry Stile* had retained him for his attorney, to proſecute a ſuit againſt *J. D.*; that *Webb*, *præmiſſorum non ignarus*, intending to ſcandalize him in his profeſſion, and to diſſuade others from retaining him, having communication with the ſaid *Humphry Stile*, falſly and maliciouſly ſaid of him, the ſaid *Nicholls*, theſe words:

An attempt to diſſuade a client from employing an attorney by ſaying that he is a notorious knave, &c. is actionable.

1. Roll. Ab. 52.

WEBB *againſt* NICHOLLS.

words: "I marvel you will employ ſuch a knave as *Nicholls* (*innuendo* the plaintiff); you will have but diſgrace and diſcredit by employing him: he (*innuendo* the plaintiff) is a proclaimed knave in the market." *Quorum præmiſſorum prætextu*, he was much prejudiced in his profeſſion, many of his clients withdrawing from him, &c. The defendant pleads not guilty: and found againſt him, and damages aſſeſſed to two hundred pounds.

Upon this judgment error brought and aſſigned, Becauſe the words were not actionable; for he doth not ſay that the communication was with the ſaid *Humphry Stile* of the ſaid ſuit, nor is it ſhewn that the words were ſpoken of the employment in his profeſſion; and therefore HEATH, *Serjeant*, moved, that an action lies not for theſe words: for to call an attorney "knave" is but a word of heat, and a word for which no action lies; and to ſay "he is a proclaimed knave in the market," is but an aggravation of the word "knave." And this caſe differs from *Bychley's Caſe*, 4. *Co.* 16.: for there he ſaith of him, being an attorney, "You are known to be a corrupt man, and to deal corruptly;" ſo as thoſe words cannot have any other expoſition than as touching his office of attorney; but it is not ſo here, &c.

Poſt. 516. Ante, 192.

But ALL THE COURT held, that the action well lies; for it is not intendable but that he ſpake of him as an evil dealer in his profeſſion; for he ſpeaking with him who uſed the ſaid plaintiff in a ſuit, and ſpeaking to him the words *ut ſupra*, they have relation to his profeſſion, and cannot have other intendment; eſpecially the plaintiff alledging that he ſpake them to ſcandalize him in his profeſſion, and the defendant pleading not guilty thereunto, and being found guilty according as the plaintiff hath counted: wherefore the judgment was affirmed.

CASE 5.

Memorandum.

Trinity Term adjourned on account of the plague.

UPON *Saturday* before the end of the Term, the king cauſed his proclamation to be publiſhed the ſame day in chancery, that in regard of the increaſe of the peſtilence in *London* and the places thereto adjoining, and the danger it might diſperſe into the country, he reſolved to adjourn the Term from *Octab. Trin.* until *Tres Trin.* and that the ſaid returns ſhould be only for furtherance of the ordinary proceedings; and that no proceedings ſhould be upon demurrers or ſpecial verdicts, nor any hearings in the ſtar-chamber, or in any of the courts of equity.

CASE 6.

Stone *againſt* Newman.

Ante, Page 427.

In pleading an attainder of treaſon which is confirmed by ſpecial act of parliament, enacting, That the forfeited lands ſhall be veſted in the Crown *without office found*, it is not neceſſary to alledge *ſeiſin* in the king. Ante, 431.—3. Term Rep. 734.

THIS Caſe was now moved again upon exceptions to the pleading.

FIRST, Becauſe there is not any ſeiſin alledged in the queen; and then *Sir Francis Wyatt's* title is good until ſeiſin; for he

had

had the first possession.—*Sed non allocatur*: for it appears, that after the attainder, the queen being intitled by the general act of parliament of 33. *Hen.* 8. c. 20. and by the special act of 1. and 2. *Philip & Mary*, c. 3. of the attainder of *Sir Thomas Wyatt*, it was in the queen without office; and that the queen granted it by patent to him, under whom the plaintiff claims, who entered, and was seised until *Sir Francis Wyatt* entered and distrained for *damage fesant*; so he had the priority of possession and right (as it was now held by the greater opinion): wherefore this exception was disallowed.

STONE *against* NEWMAN. 3. Term Rep. 734.

THE SECOND EXCEPTION was, That the indictment was by virtue of a commission granted to divers persons, and he doth not say *sub magno sigillo Angliæ*; and that the attainder was upon the trial before the commissioners, and he doth not say *sub magno sigillo*, so that if it were not *sub magno sigillo* it is not good. And in proof thereof the pleading in the common pleas in *Moulton's Case* (*a*) was remembered, that the commission was *sub magno sigillo*; and in *Huntley's Case* (*b*) in this court, because the deprivation was found before the commissioners ecclesiastical *virtute commissionis* to them directed, and he doth not say *sub magno sigillo*, it was held to be ill; and in *Page's Case* (*c*) letters patents were pleaded *sub magno sigillo*. And although it be true, that in *Walsingham's Case* (*d*) it is pleaded as here, and doth not say *sub magno sigillo*, and yet judgment given, yet it was said, that was because no exception was taken thereto. And in *Co. Ent.* 174. the commission is pleaded by letters patent *sub magno sigillo*, and an attainder by virtue thereof; and in the case of *Sir Moyle Finch* (*e*) it was so likewise pleaded. So generally the pleading is *sub magno sigillo*; otherwise it is ill, and as no attainder pleaded.

In pleading an attainder of treason in an indictment taken by virtue of a special commission, it is not necessary to state that the commission was under the great seal.

JONES, *Justice*, at the first, was of that opinion; but afterward, upon search of precedents, whereby it appeared, that sometimes *sub magno sigillo* was omitted; and when it is shewn, *quòd per literas patentes commissionis*, omitting *sub magno sigillo*, it is to be intended under THE GREAT SEAL, and not otherwise; ALL THE COURT agreed, that although it were the better course to shew that it was *sub magno sigillo*, yet being omitted, it is well enough, and good both ways.

Ante, 181.

AND THEY AGREED, that here, according to the greater opinion in the exchequer chamber, judgment should be entered for the plaintiff.

Judgment for the plaintiff.

(*a*) Cro. Eliz. 151. 2. Leon. 211. 3. Leon. 232.
(*b*) Palm. 517. 2. Brownl. 14.
(*c*) 5. Co. 52. a.
(*d*) Plowd. 547.
(*e*) Co. Ent. 194.

Porter's Case.

CASE 7.

PORTER was indicted on the statute 1. *Jac.* 1. c. 11. For that she, being lawfully married to —— *Porter*, and he then living, and she well knowing thereof, *felonicè* espoused one *Rooks*, *contra formam statuti.*

A wife separated *à mensâ et thoro causâ adulterii vel sævitiæ*, is within the exception of the 1. *Jac.* 1. c. 11. against bigamy, although the word *divorced* be not inserted in the decree.—1. Hale, 692. 3. Inst. 89. Sum. 121. Kely. 27. Co. Lit. 235. a. Burn. E. L. 418. 1. Com. Dig. 550, 551. 4. Com. Dig. 30. 1. Hawk. P. C. 174.

Upon

PORTER'S CASE.

Upon not guilty pleaded, a special verdict was found, that she was lawfully espoused to the said *Porter*; and that before SIR JOHN LAMB, Judge of the Court of Audience, she had sued a divorce from the said *Porter propter sævitiam*; where upon prosecution it was decreed, *quod propter sævitiam* of her said husband towards her, she should be separated *a mensâ et thoro* from her said husband, but no word of *divorciamus* was therein; and it was expressly intimated in the sentence, that she should not marry to any other during the life of the said *Porter*. And this sentence was found *in hæc verba*. And that afterwards, within six months, the said *Porter* living, and she knowing thereof, espoused the said *Rooks*. And if she be guilty of the felonious marrying of a second husband against the form of the statute, they prayed the discretion of the Court.

GERMYN, *for the king*, argued at the bar, that it is felony within the statute, for she is directly within the words of the body of the act, she being married to one man, and he being alive, and she, knowing thereof, marrying to another. And the proviso shall not aid her, for that doth not extend but only to persons which are *divorced* by sentence in the spiritual court; but here is not any sentence of divorce, but only a separation from her husband *a mensâ et thoro*, which is only a liberty to live from him, and a provision only for her safety, that she shall not live with him, to avoid his misusing of her by his cruelty; and there is not one word of *divorciamus* in the sentence, as there is in every case of divorce; therefore she is out of the proviso. And this is none of the divorces mentioned 47. *Edw.* 3. *folio ultimo*, where it is found, that there be but five divorces, viz. 1. *causâ professionis*, 2. *causâ præcontractûs* (a), 3. *causâ consanguinitatis*, 4. *causâ affinitatis*, and 5. *causa frigiditatis*; and this divorce is none of them, and the proviso doth not intend but when there is a sentence of an absolute divorce.

(a) *Sed quære.* See the 2. & 3. *Edw.* 6. c. 23. 1. *Eliz.* c. 1. and the marriage act, 26. Geo. 2. c. 33.

HOLBOURN and GRIMSTON, *for the defendant*, argued strongly to the contrary; for it is a penal law concerning life, and therefore ought to be favourably expounded *in favorem vitæ*, and that the proviso extends to this kind of divorce; for there be divorces *ex causâ precedente*, as in the cases of divorces cited, which be not properly divorces, but rather sentences of nullifying the marriage, which is not intended in the proviso, for such a marriage was void of itself; and by the sentence declaration is made that it was void *ab initio*; and so it is where marriage is *infra annos nubiles*; and such divorces are declared null, and by such divorce the parties are freed *à vinculo matrimonii*. But there be divorces *ex causâ subsequente*, as *causâ adulterii*, which, in the intention of some, is an absolute divorce, and that the party innocent might marry again; but others conceive that it is no absolute divorce, but only a separation *à mensâ et thoro*, and frees the parties from the performance of conjugal duties only the one with the other. For although in former times it was questioned, whether such parties divorced might marry again, yet now it is made clear by the canons that they may not; and to avoid this question principally, this proviso was added in the statute, that where sentence of divorce is given, such persons marrying shall not be in danger to be felons by this statute. By the same reason in this case there being a sentence

of

of divorce, although it doth not diſſolve parties *à vinculo matrimonii*, yet an ignorant woman cannot know that diſtinction, but they conceive, when there is a ſentence of divorce, that they are out of the ſtatute. And although there be no ſuch word as *divorciamus* in the ſentence, yet there is *ſeparamus*, and the word *divorciamus* is not uſual, but *ſeparamus*. And *Co. Lit.* 235. ſhews what divorces be *à vinculo matrimonii*, which are the divorces before cited in 47. *Edw.* 3. *pl.* 37. which are cauſes precedent the marriage; and by ſuch divorces the iſſue is made a baſtard, and thereby declared, that they were not *juſtæ nuptiæ*. But divorce *causâ adulterii* is no diſſolution *à vinculo*, but only *à menſâ et thoro*, and therefore the coverture continues betwixt them. And to that purpoſe the caſe waa cited of *Stevens v. Totty* (*a*), where the huſband, after ſuch divorce *causâ adulterii*, releaſed an obligation made to his wife before the coverture, and it was adjudged a good releaſe, which proves that the marriage continues: and one *Stowel's Caſe* (*b*), that the wife, after ſuch divorce, ſhould have dower of her huſband's land, which proves that the eſpouſals continue betwixt them. But a divorce *causâ ſævitiæ* is grounded *ex jure naturæ*, and is in the ſame manner and nature as a divorce *causâ adulterii*; and the proviſo in the ſtatute is, that the parties divorced by ſentence, if he takes another wife, or the wife takes another huſband, ſhall not be within the danger of the ſtatute. And this extends to every manner of ſentence of divorce, and not to any particular cauſe of divorce; and ſo concluded, that ſhe is within the proviſo of the ſaid ſtatute, and ſo not guilty of the felony.

Porter's Caſe.

Moor, 665. Noy, 45. Co. Lit. 235. a. Cro. Eliz. 908. 1. Salk. 115. 5. Mod. 71. Powell on Contracts, 92.

3. Inſt. 89.

But THE COURT much doubted whether ſhe were within that proviſo; and if this ſhould be ſuffered, many would be divorced upon ſuch pretence, and inſtantly marry again, whereby many inconveniences would enſue. Whereupon ſhe was adviſed not to inſiſt upon the law, but to procure a pardon to avoid the danger; for it was clearly agreed by all the civilians and others, that this ſecond marriage was unlawful, and that ſhe might be in danger to be adjudged a felon by this ſtatute.

(*a*) Cro. Eliz. 908. Eaſter Term, 44. Eliz. Roll 292.

(*b*) Noy, 108. Godb. 145. Trin. Term 2. Jac. 1. Roll 815.

Trinity

Trinity Term,

12. Car. I. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

BARON and *feme executrix* recover in debt. The *feme* dies before execution. The *baron* cannot have a *ſcire facias* on the judgment, for it is *in autre droit*. But if he has obtained judgment upon the return of the *ſcire feci*, it is good till reverſed.

Sed quære, If a writ of error will lie to reverſe it? (*a*)

Ante, 208. 227. 286.
Co. Lit. 351.
Jones, 248. 386.
1. Roll. Ab. 889.
Cro. Eliz. 730.
5. Mod. 230.
1. Salk. 263.
5. Com. Dig. 288.
3. Bac. Ab. 212.
1. Cromp. Prac. 343.
2. Mod. 179, 180.

Anonymous.

SCIRE FACIAS. Upon a judgment given in debt for huſband and wife *as adminiſtratrix* to her firſt huſband, the wife being dead after judgment, and before execution, the huſband brought a *ſcire facias*, and upon the *ſcire feci* returned obtained a judgment by *nihil dicit*.

This being a judgment of the laſt Term, ROLLE now moved to ſtay execution; for the debt being due to the wife *as adminiſtratrix*, although the recovery be by the huſband and wife, ſhe being dead, the huſband may not have execution upon this judgment, for the debt was due to the wife *in auter droit*.

And ALL THE COURT was of this opinion, that the *ſcire facias* ought not to be brought by the huſband; but being ſued, and judgment obtained thereupon the laſt Term, although the judgment be erroneous, yet it ought to ſtand until it be reverſed by error.

But, Whether he may have a writ of error in the exchequer chamber, *tam in redditione judicii quàm in redditione executionis?* JONES and BERKLEY doubted; for upon a judgment in a *ſcire facias* in this court there lies no writ of error in the exchequer chamber. But *I* held, foraſmuch as this *ſcire facias* is but to have execution grounded upon a former judgment, it is within the 37. *Eliz.* c. . and that a writ of error lies in the exchequer chamber to reverſe the judgment and the execution; and although there be no error upon the judgment, but that it be affirmed, yet the execution may be reverſed. But BRAMPSTON, *Chief Juſtice*, doubted thereof; *ideo* CURIA *adviſare vult.*

(*a*) *Vide* 17. Car. 2. c. 8. which gives *ſcire facias* to an adminiſtrator *de bonis non*; and by 29. Car. 2. c. 3. the huſband ſhall have adminiſtration.

CASE 2.

An indictment againſt two that they *inſultum fecerunt*, is good, although the grand jury find *Ignoramus* as to one of them.

3. Co. 121.
Cro. Eliz. 108. 754.
2. Hale, 169.

Cholmley's Caſe.

INDICTMENT againſt *Jaſper Cholmley* and *John Cholmley*, of *Hoxton*, in the county of *Middleſex*, gentlemen, For that they *inſultum fecerunt* upon JOHN HIGHAM, Doctor of Phyſic, *in eccleſiâ de* SHOREDITCH *prædictâ*; *et prædict.* JOH. HIGHAM, *ad tunc et ibidem, in eccleſiâ de* SHOREDITCH *prædict. verberaverunt, vulneraverunt, et malè tractaverunt, contra formam ſtatuti, &c.*

The grand jury find BILLA VERA as to *Jaſper Cholmley*, and IGNORAMUS for *John Cholmley*. And hereupon he appeared, and pleaded not guilty; and it was found againſt him.

2. Hawk. P. C. 338, 339; and ſee the caſe of Rex v. Fieldhouſe, Cowp. 325.

ROLLE

ROLLE now moved in arreſt of judgment, that the indictment was not good, being *fecerunt*, whereas it is found only *billa vera* againſt one.—*Sed non allocatur*; becauſe it was exhibited againſt two, and it is but falſe *Latin*. CHOLMLEY'S CASE.

SECONDLY, Becauſe the indictment is *contra formam ſtatuti*; and this offence is not puniſhable by the ſtatute, unleſs that he ſmote with a weapon, or drew a weapon in the church or church-yard, or drew a weapon to that intent, which is not mentioned in the indictment: and by the ſecond clauſe in the ſtatute, for ſmiting or laying violent hands, it is excommunication *ipſo facto*; and it is not mentioned here how he ſtruck.—And thereof the JUSTICES doubted. An indictment concluding *con. for. ſtat.* for an offence not puniſhable by the common law, is bad, if there is no ſtatute to ſupport it.

Cro. Eliz. 231. 2. Leon 10. 5. Co. 99. 2. Roll. Rep. 263. 2. Roll. Ab. 82. 4. Mod. 17. 2. Hale, 170. 2. Hawk. 356.

JONES, *Juſtice*, ſaid, that the indictment was good for battery at the common law. But ALL THE OTHER JUSTICES were againſt him therein; for the indictment concluding *contra formam ſtatuti*, it cannot be good, as for an offence at the common law. An indictment for *battery* concluding *con. for. ſtat.* is bad.

2. Hale, P. C. 192. 2. Hawk. P. C. 358.

But afterwards another exception was taken by GRIMSTON, Becauſe the offence was alledged to be done in the church of *Shoreditch aforeſaid*, and *Shoreditch* was not named before; and upon view of the indictment it appearing to be ſo,—ALL THE COURT held, that the indictment was void: and for this cauſe the judgment was ſtayed. An indictment for an aſſault at *A. aforeſaid* is bad, if no place be previouſly mentioned.

Poſt. 504.

Smith's Caſe.

CASE 3.

MARY SMITH and Others were indicted upon the 4. & 5. *Philip & Mary*, c. 8. in the county of *Middleſex*, before the juſtices of the king's bench, Becauſe they took and conveyed away *Frances* the daughter of *Scipio Squire*, being under the age of ſixteen years, unmarried, and in the cuſtody and under the government of her ſaid father, without his conſent, *et contra formam dicti ſtatuti*. And upon this *Mary Smith* pleaded not guilty, and was found guilty. *Qu.* If the king's bench has juriſdiction over the offence of ſtealing an heireſs?

2. Mod. 128. 3. Mod. 84. 6. Mod. 168. Vaugh. 177. 5. Mod. 221. Stra. 1162. Brown's Ch. Ca. *Mich. Term*, 19. *Geo.* 3. 1. Hawk. P. C. 173.

It was moved in arreſt of judgment, that the indictment in this court was not good, being *coram non judice*; becauſe the ſtatute appoints, that for this offence the party offending ſhall be puniſhed by two years impriſonment, or ſhall pay ſuch a fine as *the ſtar chamber* ſhall appoint. The words in the ſtatute are, that "the "counſel in the ſtar chamber, and the juſtices of aſſiſe, by inqui-"ſition or indictment ſhall have power to hear and determine, &c." And the queſtion was, Whether this may extend to juſtices of the king's bench to give them authority to inquire, or only to juſtices of aſſiſe? and, Whether juſtices of the king's bench be not juſtices of aſſiſe?

But of this THE COURT doubted, becauſe there be no juſtices of aſſiſe for the county of *Middleſex*.

THE SECOND QUESTION was, Admitting they may hear and determine, Whether they may impoſe any fine, or only give judgment for the impriſonment, becauſe the fine is appointed to be aſſeſſed in the ſtar chamber, and in no other place? *Quære* (*a*). (*a*) It is determined, that the king's bench has juriſdiction over this offence. 2. Lev. 172. 179. 3. Keb. 708. 715. 4. Mod. 154. 3. Sid. 362. 2. Mod. 128. 2. Hawk. P. C. 9.

Memorandum.

Case 4.

Memorandum.

Trinity Term postponed by writs of adjournment, according to a former proclamation, on account of the increase of the plague.

IN regard of the increasing of the pestilence in *London* and the places adjoining, THE KING, according to his proclamation formerly made, directed his writs of adjournment to the king's bench, common pleas, and the exchequer, to adjourn the Term from *Octabis Trinitatis* to *Tres Trinitatis*. And upon the same day o *Octabis* all the Courts sat until eleven of the clock in the forenoon, and heard motions concerning matters in arrest of judgment, and pleadings, and indictments, and writs of error, where it appeared that the writs of error were brought for delays of execution, and no colour of error; but no judgments in any demurrer, or matter in law upon special verdict, unless it were in cases which were moved the last Term; and rule given, that if cause were not shewn the first or second day of this Term, judgment should be entered for the plaintiff or defendant, as the case required: there, upon motion, although it were upon demurrer, or special verdict, no cause being shewn to the contrary, the Court gave judgment according to the former rule; and so JUSTICE HUTTON said they did in the common pleas.

If gaolers permit their prisoners to go at large under colour of a *habeas corpus*, it is an escape; but upon necessity they may, by rule of Court, keep them, *sub salvâ et arctâ custodiâ*, anywhere out of the prison. Ante, 14. and 210.

Hutton, 122. 2. Roll. Ab. 808. Hob. 202. Moor, 299. 3 Co. 43. Noy, 38. Hard. 476. Comyns, 422. 554. 3. Keb. 305. 2. Mod. 116. 10. Mod. 79. 12. Mod. 31. 227. 583. Ld. Raym. 241. 788.

And afterward, upon the same day, BRAMPSTON, *Chief Justice*, published, "That whereas the prisoners of the King's Bench and "Fleet had several times petitioned the king, for avoiding the dan- "ger of the infection of the plague much increasing, that they who "could give sufficient security to the Marshal or to the Warden of the "Fleet to be true prisoners, and to return to prison at the days to "them prescribed, might go at large by *habeas corpus* for that time (as "they pretended was the ancient course in former times upon the "like cases)"—ALL THE JUSTICES AND BARONS of the exchequer, except LORD FINCH, *Chief Justice* of the common pleas, and BARON DENHAM (who were not in town), being assembled at the LORD KEEPER's house to consult of this matter, and what course was to be taken for the safeguard of the prisoners, upon conference with the Lord Keeper, resolved, That a *habeas corpus* was an ancient and legal writ; but under colour thereof the Warden of the Fleet and Marshal of the King's Bench ought not to suffer prisoners to go at large, but that such permission is an abuse of the said writ, and an escape in the keeper of the prison: but for the safeguard of the prisoners (who might, if they would, provide for themselves by payment of their debts, and be discharged), the Warden of the Fleet, by rule or licence of the Courts to which they are subject, and the Marshal of the King's Bench, by rule from the King's Bench, may keep their prisoners in any other place in the country to be assigned by the Courts to them (*a*); but there they ought to be kept as prisoners, *sub salvâ et arctâ custod.* as they ought to be in their proper prisons. And this resolution was delivered to the king under all their hands; and the king signified his pleasure that he very well approved thereof, and commanded that it should be observed. And it was remembered, that in *primo Caroli*, when the Term was at *Reading*, such resolutions were by all the Justices.

And afterward, about eleven of the clock the same day, the writ of adjournment was opened, and openly read; and the Term was adjourned until *Tres Trinitatis*.

(*a*) See 3. Term Rep. 583, 584. respecting the extent of the rules of the prison, and the restrictions under which *day rules* are now to be granted.

NOTE,

NOTE, That neither chancery, the exchequer chamber, nor the duchy court, did ſit all this Term.

Stone *againſt* Lingar and Others.

CASE 5.

A *conſtable* acquitted on an action on the caſe for a falſe preſentment is not entitled to *double coſts* under 7. *Jac.* 1. c. 5. Ante, 175. 285. 2. Lev. 251. 1. Show. 215. 2. Vent. 45. Carth. 189. B. R. H. 125. 2. Com. Dig. §57.

ACTION ON THE CASE. Whereas the plaintiffs were inhabitants and poſſeſſed of ſuch lands for years in the pariſh of *St. Martin*'s, and were there liable to the payment of all duties for the reparation of the church of the ſaid pariſh, and to all taxes and charges within the ſame; that the defendant, being CONSTABLE of *Roxborough*, falſely preſented that they were inhabitants in the pariſh of *Roxborough*, and poſſeſſed of the ſaid lands in the pariſh of *Roxborough*, and chargeable there to the payment of ſuch duties; by reaſon whereof they were compelled to pay ſuch ſums unduly, for which they brought this action.

Upon not guilty pleaded, the defendant was found not guilty.

And GRIMSTON moved for the defendant to have double coſts, becauſe what he did was by virtue of his office, and by the ſtatute of 7. *Jac.* 1. c. 5. he ought to have double coſts.

ATKINS, on the other ſide, moved, that this being a ſpecial action on the caſe for falſe preſentment (and not an action of treſpaſs or falſe impriſonment), wherein liberty is given to plead "*not guilty*" and give the ſpecial matter in evidence; and the queſtion being, In what pariſh the ſaid lands were? that it was out of that ſtatute, but within the ſtatute of 23. *Hen.* 8. c. 15. which gives ſingle coſts to the defendant.

ALL THE COURT were of this opinion, and gave rule accordingly.

Eaſter

Eaſter Term,

13. Car. I. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Humphrys *againſt* Stanfeild.

CASE I.

ACTION FOR WORDS. Whereas the plaintiff being ſon and heir-apparent to *John* his father, who was poſſeſſed of goods to the value of two hundred pounds, and ſeiſed of lands to the value of forty pounds *per annum*; and whereas *William Humphrys*, his uncle, was ſeiſed in fee of lands of the value of forty pounds *per annum*, and he the plaintiff was in likelihood to be his heir; that the defendant, to diſgrace the plaintiff, and to make others have an ill opinion of him, ſaid maliciouſly and falſely of the plaintiff, "Thou art a baſtard." Upon not guilty pleaded, and found for the plaintiff, and damages aſſeſſed to forty pounds,

An action will lie for ſaying of an *heir* "Thou "art a baſtard," without proving ſpecial damage. Jones, 388. 1. Roll. Ab. 38.

MAYNARD moved in arreſt of judgment, that theſe words are not actionable, becauſe he doth not ſhew any particular damage.

But ALL THE COURT held, that the action lies; for by reaſon of theſe words he may be in diſgrace with his father and uncle, and they conceiving a jealouſy of him touching the ſame, it is poſſible they may diſinherit him; and although they do not, yet the action lies for the damages which may enſue.—And JONES cited, that in the exchequer *Vaughan* brought an action againſt *Ellis* (*a*), ſurmiſing, that land was given to the plaintiff's grandfather, and to the heirs males of his body; and that he had iſſue the plaintiff's father, who had iſſue the plaintiff and divers other ſons then living, who by poſſibility might be heir to that intail: that the defendant ſaid of him, "Thou art a baſtard," whereupon he brought his action; and it was adjudged maintainable, and this judgment affirmed in a writ of error. And another caſe was cited to be ſo reſolved in this court, of *Baniſter v. Baniſter* (*b*).—ALL THE COURT was of this opinion. Wherefore rule was given, that judgment ſhould be entered for the plaintiff, unleſs, &c.

(*a*) Cro. Jac. 213. (*b*) Jones, 388.

CASE 2.

William Slater's Case.

An original order of baſtardy made by the ſeſſions cannot be vacated by juſtices of aſſize, or annulled by a ſubſequent order made by the two next juſtices.

2. Bulſt. 349. 355. 2. Vent. 310. 2. Com. Dig. 585. 3. Burr. 1679. See Mr. Conſt's edition of Bott's Poor Laws, vol. i. page 443. 3. Term Rep. 496.

WILLIAM SLATER was, by *Elizabeth Eaton*, charged with the getting of a baſtard-child on her body.

The two next juſtices did not make any order in it, according to the 18th *Eliz.* c. 3.; but the cauſe came firſt to be originally heard at the general ſeſſions of the peace at *Spalding*, in the county of *Lincoln*, 13. *July*, 8. *Car.* 1. where the juſtices ordered, that "WHEREAS it was proved by witneſſes, that one *Alexander Leigh* "had often uſed private company with the ſaid *Elizabeth Eaton*, "and had confeſſed that he had done as much to her as a man "could do to a woman; and that ſhe had ſaid, that *Leigh* had the "uſe of her body, and that ſhe feared ſhe was with child by him; "THAT thereupon *Slater* ſhould be diſcharged of the child, and "ſhe be committed to the houſe of correction during her life (*a*); "and that *Alexander Leigh*, the reputed father, ſhould pay from "the birth of the child, to the churchwardens of *Pinchback*, weekly "fourteen-pence towards its maintenance, until the age of fourteen "years, and the overſeers then to take the child."

Afterwards, 1ſt *Auguſt*, 12. *Car.* 1. at the aſſizes at *Lincoln*, upon complaint of the inhabitants of *Pinchback* to the Judges, they ordered, "That two of the next juſtices to the pariſh where the "child was born (naming them) ſhould take conſideration there-"of, according to the ſtatute, and ſettle ſuch courſe therein as to "juſtice appertained."

Whereupon thoſe two juſtices 1ſt *March*, 12. *Car.* 1. declared "the ſaid *William Slater* to be the reputed father, and that he ſhould "pay (the child being five years old, and all that time having been "maintained at the pariſh charge) at one payment 18l. to the "overſeers of the ſaid pariſh, and 14d. weekly till the child came "to fourteen years of age, and to give his bond of fifty pounds "for performance thereof."

SLATER refuſing to pay or give bond, the ſaid juſtices of peace committed him (*b*); whereupon he ſued out a *certiorari* to remove the proceedings into this court; who appearing upon an *habeas corpus*, and upon reading of the return, and hearing counſel on both ſides, GRIMSTON being of counſel for *Slater*, theſe points were reſolved by the whole Court:

By 18. *Eliz.* c. 3. an order of baſtardy could only be made by two juſtices.

FIRST, That before the 3. *Car.* 1. c. 4. the juſtices at the ſeſſions had no authority to meddle in the caſe of baſtardy, till the two next juſtices, according to the 18. *Eliz.* c. 3. had made an order therein; and that then, and not before (the party refuſing to perform the order, upon his appeal giving reaſonable ſecurity to appear at the next ſeſſions, and abide ſuch order as the juſtices there, or the more part of them, ſhould make, &c.), the juſtices at the ſeſſions might make a new order, &c. otherwiſe not.

But by 3. *Car.* 1. c. 4. the ſeſſions have an original juriſdiction in caſe of baſtardy.

SECONDLY, That by the ſtatute of 3. *Car.* 1. c. 4. the juſtices of the ſeſſions have power and authority *originally* to make an order in the caſe of baſtardy; for the words of the ſtatute are, *viz.* "That all juſtices of the peace within their ſeveral limits and

(*a*) See 7. Jac. 1. c. 4. 13. & 14. Car. 2. c. 1. ſ. 19. 6. Geo. 2. c. 19. and 6. Geo. 2. c. 31. (*b*) 2. Bulſt. 341. 343. 1. Salk. 121. 2. Mod. 4. B. R. H. 112. 160.

"precincts,

" precincts, and in their ſeveral ſeſſions, may do and execute all " things concerning that part of the ſtatute touching baſtards " begotten out of lawful matrimony, that by juſtices of the peace " in the ſeveral counties are by the ſaid ſtatute limited to be done." And therefore the firſt order made by the ſeſſions was in this caſe good and legal, and the ſecond order made by the two next juſtices void, and could not alter or revoke the order which was firſt made by good authority; and for proof thereof one *Pridgeon's Caſe*, *ante*, 341. & 350. was cited (*a*).

SLATER'S CASE.

(*a*) 2. Bulſt. 343. 355

Jones, 330. Stra. 475. 503. B. R. H. 79. 301. 1. Vent. 310.—*Sed vide* 1. Mod. 480. 1. Vent. 48. 20. Salk. 475.

THIRDLY, it was objected, That the commitment of *Elizabeth Eaton* for life, for her firſt offence, was more than the juſtices had authority to do, and therefore the order void. But it was reſolved, that an error in part, and in that part of the order which only concerned her, ſhould not vitiate the whole order (*b*).

An order of ſeſſions is not void by being bad in part.

(*b*) By 5. Geo. 2. c. 19. the ſeſſions may amend defect of form.

Goodier *againſt* Platt.

CASE 3.

Hilary Term, 11. *Car.* 1. *Roll* 349.

ERROR of a judgment in the common pleas, in *formedon*. The judgment was upon verdict, *quòd recuperet ſeiſinam de uno meſſuagio et duabus acris terræ et paſturæ*," not mentioning ſeverally the quantity of the land, nor the quantity of the paſture; which being ill for the incertainty, it was moved, that the judgment might be affirmed for the meſſuage, which is certain as to that.

An ejectment for *meadow* and *paſture*, without mentioning the quantity of each kind, is bad.

Vide poſt. 573.

Cro. Jac. 290. 1. Roll. 779. Ley, 82. Cowp. 347. Dougl. 305. 1. Term Rep. 11.

But IT WAS HELD, that though the common pleas might have given judgment for the meſſuage only, yet when they have given an intire judgment for the meſſuage and land, this being ill in part, ought to be reverſed for the whole, and cannot be affirmed for part, and reverſed for the reſidue.

If a judgment be erroneous in one part, it ſhall be reverſed for the whole.

1. Lev. 213.

1. Roll. Rep. 2. 1. Roll. Ab. 775. 1. Salk. 24. 5. Com. Dig. 303.

Turner *againſt* Lee.

CASE 4.

REPLEVIN. The defendant avows as executor for the arrears of a rent-charge granted to the teſtator for divers years, if he lived ſo long. The plaintiff takes iſſue, *quòd non conceſſit*; and found for the avowant.

On the death of a grantee of a rent for years, if he ſo long live; his executor or adminiſtrator cannot diſtrain for arrears either by the common law, or 32. *Hen.* 8. c. 37.

And after verdict it was moved in arreſt of judgment by ROLLE, that this avowry was not good, becauſe the rent granted for years being determined, the executor cannot, by the ſtatute of 32. *Hen.* 8. c. 37. diſtrain; for that ſtatute extends to thoſe who have rent for life or inheritance.

But HENDEN, *Serjeant*, ſaid, that it is within the equity of the ſtatute, becauſe the eſtate is determinable upon a life; and if it were not good, yet being admitted, and the iſſue being upon the grant, and found, it is good enough.

Co. Lit. 262. Cro. Eliz 372. Dyer, 375. 4. Co. 49. 7. Co. 37.

Lutw. 1230. 18. Viner's Abr. 546. Vaugh. 40. 2. Eſpin. Dig. 22.

TURNER *againſt* LEE.

But ALL THE COURT reſolved, that it is not within the ſtatute, for that provides remedy where the teſtator died ſeiſed of a rent to him and his heirs, or for life, and by his death there was not any remedy for the executor, as it appears by the preamble of that ſtatute; but where he hath remedy by the common law by action of debt, as in this caſe the executor hath, he cannot diſtrain; and although the iſſue is upon a *non conceſſit*, and it is found *quòd conceſſit*, yet it being an ill avowry in ſubſtance, judgment ſhall be given againſt him (*a*).

(*a*) See the Caſe of Hoole *v.* Bell, Ld. Raym. 173. where it is determined, that the 32. *Hen.* 8. c. 37. is a remedial law, and ſhall extend to all tenants for life; that the law has been ſo taken always ſince the ſtatute; that the words of the ſtatute are general enough to extend to all; that they ſeem to be admitted in the caſe of Lambert *v.* Auſtin, Cro. Eliz. 332. and therefore the rule laid down in the preſent caſe of Turner *v.* Lee, ſo generally taken, cannot be law. See alſo *Mr. Hargrave's* note 4. Co. Litt. 162. a. and note 1. Co. Litt. 162. b. and 8. *Ann.* c. 14.

CASE 5.

Anonymous.

To ſay of *a trader* that he is "a beggarly fellow, and not able to pay his debts," is tantamount to calling him a bankrupt.

ACTION FOR WORDS. Whereas the plaintiff was a grocer, and lived by his trade of buying and ſelling; that the defendant, to ſcandaliſe him, ſaid of the plaintiff, "He is a beggarly fellow, and not able to pay his debts." Upon not guilty pleaded, and found for the plaintiff, ROLLE moved, that theſe words were not actionable.—But ALL THE COURT againſt him, that the action lies; for theſe words *tantamount* as if he had ſaid he had been a bankrupt.

Ante, 31. — 1. Roll. Ab. 61. 1. Sid. 424. 1. Lev. 276. Carth. 330. Raym. 184. Stra. 762. Ld. Raym. 1480. 1. Com. Dig. 183.

CASE 6.

Snape *againſt* Turton.

If tenant for life, with a power appendant, make a leaſe for years, it is no ſuſpenſion of the power as to the fee.

UPON a ſpecial verdict it appeared, that *Arthur Robſart*, 15. *Eliz.* made a conveyance to divers uſes, *viz.* to the uſe of himſelf for life, with divers remainders over, with a PROVISO, that if he made a conveyance of the premiſes in fee or fee-tail, that it ſhould be good, and a revocation of the former uſes; and it was found, that he made a leaſe for years, and the next day granted the reverſion in fee, to which the leſſee attorned (*b*).—Whereupon IT WAS RESOLVED, that although there be not one intire eſtate in fee conveyed, yet both being found, and that it was with an intent to make a fee to paſs, that this was a revocation within the proviſo.

W. Jones, 392. Co. Lit. 237. 6. Co. 32. 2. Roll. Abr. 263. 701. Hob. 348. 9. Co. 107. Pow. on Pow. 17. 112. 5. Com. Dig. 632. 635. 1. Term Rep. 705.

(*b*) See 4. and 5. Ann. c. 16. and 11. Geo. 2. c. 19. by which both the neceſſity and efficacy of attornments have been almoſt totally taken away.

Trinity

Trinity Term,

13. Car. 1. In the King's Bench.

Sir John Bramſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

Blague *againſt* Gold.

CASE 1.

Hilary Term, 12. *Car.* 1. *Roll* 752.

Ante, Page 447.

THIS caſe was now argued again by ROBERT HYDE *for the plaintiff*, and by CHARLES JONES *for the defendant*; and the caſe was cited as before, but only this clauſe added, which was in the will, *viz.* "upon condition that the ſame be new built, "according to the covenants betwixt me and *Bernard Calvert*." And it was found, that this houſe was the houſe in queſtion, and was, at the time of the will making, in the tenure of *Hitchcock*, and that the corner houſe was in the tenure of *Wilſon* and *Nott*; and that the covenants with *Bernard Calvert* were for the re-edifying of the ſaid corner houſe: *et ſi ſuper totam, &c.*—And this being now argued, JONES, BERKLEY, and MYSELF (*abſente* BRAMPSTON), delivered our opinions *ſeriatim*, that the corner houſe only paſſed by the will, and not the houſe adjoining in the tenure of *Hitchcock*; for although the corner houſe was not in the tenure of *Hitchcock*, but a miſpriſion, yet the deviſe is good, for it is ſufficiently aſcertained before, *viz.* the corner houſe in *Andover*. And the addition *in tenurâ* HITCHCOCK, although it be not in his tenure and is a miſtake, yet it is but ſurpluſage, and, although falſe, ſhall not vitiate the deviſe, becauſe the deviſe was of a thing certain at the firſt, and ſhall be expounded according as the intent of the parties is apparent; and it is the ſtronger here by reaſon of the covenant to re-edify the corner houſe, and not the other (*b*). Wherefore it was adjudged for the plaintiff.

If a man has a corner houſe in the tenure of *A.* and another houſe adjoining it in the poſſeſſion of *B.* and he deviſes his corner houſe in the poſſeſſion of *A.* and *B.* the corner houſe only ſhall paſs. Ante, 447. 2. Roll. Ab. 54. Cro. Jac. 22. 3. Co. 10. Hob. 171. Jones, 379. Powell on Dev. 416. Cowp. 363. 657. 808. Dougl. 760. 2. Ter. Rep 498. (*b*) *Vide* Dyer, 376. Catton's Caſe, and Wriothſley and

Dyer, 292. 2. *Edw.* 4. fol. ultimo. 2. Co. Doddington's Caſe, fol. 32. Plowd. Adams's Caſe.

Evans and Finch's Caſe.

CASE 2.

EVANS and FINCH were arraigned at the gaol delivery of *Newgate*, For that they, about twelve of the clock in the forenoon, broke open *domum manſionalem* HUGONIS AUDLEY in the *Inner Temple*, no perſon being in the ſaid houſe, and ſtole from thence forty pounds.

An abettor of a robbery on 39. *Eliz.* c. 15. if he do not actually enter the houſe, is not within the ſtatute, though he ſees the principal take the money.

Upon the evidence it appeared, that the ſaid *Evans*, by a ladder, climbed to the upper window of the ſaid *Hugh Audley*'s chamber, and took out thereof the ſaid forty pounds; and that the ſaid *Finch* ſtood upon the ladder in the view of the ſaid *Evans*, and ſaw *Evans* in the chamber, and was aſſiſting and helping to the committing of the ſaid robbery, and took part of the money.

1. Jones, 394. 3. Inſt. 63.

EVANS and FINCH'S CASE.

And all this matter being found, IT WAS ADJUDGED, Becauſe the ſaid *Finch* did not enter into the chamber, that he was not within the ſtatute of 39. *Eliz.* c. 15. which takes away clergy where a houſe is broke open, and the robbery is above the value of five ſhillings, no perſon being therein, and that he ſhould have his clergy, which was allowed him (*a*).

(*a*) The reaſon of the difference is, becauſe clergy is taken away only from the *perſon* taking, and not from the *offence*. See alſo 3. Inſt. 65. 11. Co. 37. Ld. Chief B. Parker's MSS. 1. Hale, 521. 527. 566. 2. Hale, 358. Sum. 83, 237. Kely. 27. 52. Foſter, 357. and 2. Hawkins's Pleas of the Crown, ch. 33. ſ. 98. who doubts the propriety of this deciſion; but the queſtion is now ſettled by the 3. & 4. *Will. & Mary*, c. 9. which excludes clergy from all aiders, &c. in ſuch caſes. See 4. Burr. 2096.

Chambers in the inns of court and chancery are the manſion-houſes of their reſpective inhabitants.

3. Inſt. 65. 2. Hale, 358. Jones, 394. Cowp. 5. Caſes in Crown Law, 2. edit. page 84. 205. 249.

And as for *Evans*, the ſpecial verdict found, that it was in the chamber of *Hugh Audley* in the *Inner Temple*, and that the robbery was committed betwixt twelve and one of the clock in the day-time, no perſon being within the chamber at the time of the breaking thereof, but that divers perſons were in the *Inner Temple Hall* and in other places of the houſe; and whether this be a breaking open the houſe and taking of goods above the value of five ſhillings, no perſon being within the houſe, and within the ſaid act of 39. *Eliz.* c. 15. they prayed the diſcretion of the Court.—And, FIRST, IT WAS RESOLVED, that a chamber of any inns of court or chancery broken open may be ſaid to be *domus manſionalis* of him who is owner of the ſaid chamber; whereof at firſt I doubted, until I was informed that divers precedents were for burglary in breaking open ſuch chambers.

To ouſt an offender of clergy under the 39. *Eliz.* c. 5. there muſt be *a breaking* of ſome part of the houſe.

(*b*) 2. Hale, 357. Foſter, 108. 2. Hawk. ch. 33. and 88.

SECONDLY, IT WAS RESOLVED, upon this ſpecial verdict (being removed by *certiorari* into the king's bench, and the priſoner removed by *habeas corpus*), that this breaking (*b*) open the chamber and taking forty pounds out thereof, no perſon being therein, although there were divers perſons in other parts of the houſe (*c*), was within the ſtatute of 39. *Eliz.* c. 15. which takes away clergy from ſuch offenders. Whereupon clergy was denied to the ſaid *Evans*, and judgment given in the king's bench, that he ſhould be hanged.

(*c*) Kely. 27. 52. 2. Hawk. Ch. 33. ſ. 97.

CASE 3.

Ceely *againſt* Hopkins and his Wife.

How far words imputing *witchcraft* were actionable before the repeal of the 1. *Jac.* 1. c. 12. making witchcraft felony. Ante, 324.

ACTION FOR WORDS. Whereas the wife, *dum ſola fuit*, ſpake of the plaintiff theſe words, "He is a witch, and a ſtrong "witch, and hath bewitched me and my aunt *A. S.*" (the aunt of the ſaid wife *innuendo*) "therefore I will not marry him."

The defendant pleaded "*not guilty*;" and it was found againſt her, and damages given to forty pounds.

GERMYN, *Serjeant*, moved in arreſt of judgment, that theſe words are not actionable; for to call one witch generally is not actionable, as it was adjudged in this court in *George v. Harvey* (*a*), and in another caſe, *Hawkes v. Ange* (*b*); and for the latter words, it is not ſaid that he did them any bodily harm, and his bewitching, without doing ſome bodily harm to the perſon or cattle, is not puniſhable by the 1. *Jac.* 1. c. 12. (*c*); ſo when he is not endan-

(*a*) Ante, 324.
(*b*) Cro. Jac. 531.
(*c*) Repealed by 9. Geo. 2. c. 5. *Vide* 1. Hawk. P. C. p. 9.

gered

gered by ſuch words, there is no cauſe of action at the common law.

CERLY *againſt* HOPKINS and his WIFE.

And ALL THE COURT held, that for the firſt words, "Thou art "a witch, and a ſtrong witch," no action lies, for they are too general: but to ſay, "You have bewitched me and my aunt," BRAMPSTON, JONES, and BERKLEY held, that the action lies; for it ſhall be intended he bewitched them in their perſons: and although it be not ſhewn that any bodily wrong or harm was done to them by this witchcraft, yet it is an offence puniſhable by the ſtatute, which doth not mention bodily harm to the perſon of any; but generally, if he bewitch any perſon, it ſhall be an offence puniſhable by the ſtatute.

But *I* much doubted thereof; for words ſhall be always taken *in mitiori ſenſu*, and not in an ill ſenſe if they may have any reaſonable intendment: and here it may be that he bewitched them with fair words, as the common ſaying is; and the words ſubſequent maintain that intent, "therefore I will not marry him."

But the other Juſtices ſaid, that they would not ſo intend it; but he ought to have pleaded ſpecially to have extenuated it, if he would have it to be ſo intended. But they would further adviſe (*a*).

(*a*) It was moved again, and judgment given for the plaintiff. Poſt. 480.

Dodſon *againſt* Lynn.

CASE 4.

Trinity Term, 11. *Car.* 1. *Roll* 446.

EJECTMENT of a leaſe of an houſe and lands in *Molesworth* for three years. Upon not guilty pleaded, and ſpecial verdict, the caſe was, *Edward Lynn*, the defendant, being parſon of *Molesworth*, the land in the declaration being found to be parcel of the glebe of the rectory, and that the ſaid rectory is a benefice with cure over the value of eight pounds a-year; it was found, that he was chaplain to the *Earl of Saliſbury*, and obtained licence from the *Archbiſhop of Canterbury* to accept of another benefice *modò ſit infra* ten miles of the former, which was confirmed under the great ſeal. *Lynn* accepts another benefice with cure, which was found to be diſtant ſeventeen miles from the firſt, and was inſtituted and inducted thereto, both being within the dioceſe of *Lincoln*; and that the archbiſhop made his viſitation within the dioceſe of *Lincoln*, and inhibited the *Biſhop of Lincoln* to execute any juriſdiction during his viſitation; and that the patron omitted to preſent to the firſt benefice within the ſix months; and that the *Biſhop of Lincoln* within the ſecond ſix months collated the leſſor of the plaintiff to the firſt benefice, who was admitted, inſtituted, and inducted thereto, and made the leaſe.

In a licence to a parſon with cure of ſouls to accept of another benefice "*modò* "*ſit infra*" ten miles of the former, the words "*modò ſit infra*" ſhall not be taken as *a condition* ſo as to make the firſt benefice void on the taking of the ſecond.

S. C. Jones, 394. 2. Roll. Ab. 357. Owen, 152. Co. Lit. 203.

The queſtion was, Whether the plaintiff hath good title againſt the defendant? The principal doubts herein were,

FIRST, Whether "*modo ſit*" was a condition in this licence, and made the firſt benefice void when he took the ſecond?

SECONDLY, Whether the biſhop collating during the time of the archbiſhop's viſitation, and after his inhibition, were good?—And becauſe theſe queſtions concerned eccleſiaſtical juriſdiction, the Court required to hear civilians in theſe points.

Qu. If a collating by a biſhop during the archbiſhop's viſitation, and after his inhibition, be good. 2. Bl. Rep. 969.

Dodson *againſt* Lynn.

R. 421 696.

Doctor Duck and Dr. Eden argued *on the part of the defendant*, and Dr. William Lewen *for the plaintiff*. And it was moved on the defendant's part, and there were ſhewn divers texts in the civil law, that "*modo*" and "*dummodo*" are expreſs proviſos in ſuch licences, and do not make a condition, unleſs there be added other words, "*that if he do otherwiſe, that then it ſhall be* "*void*;" but is only as an admonition or caution, that he ſhall be puniſhable by eccleſiaſtical cenſures, if he doth otherwiſe: and that this hath been always the expoſition upon granting ſuch licences.

Co. Lit. 203. b. 204.

And, after argument at the bar, all the Court reſolved, that this being there the expoſition always after the ſtatute, although it be generally a condition in the expoſition of the law, as "*dummodo*," "*ita quòd*," and the like, yet it is now to be expounded as it hath been uſually; otherwiſe great inconveniences would enſue, the multitude of benefices would be void, and in lapſe to the king, where they have been quietly enjoyed by the other conſtruction, after ſuch avoidances pleaded. And therefore they all agreed, that it ſhould not be here taken as a condition to make the firſt benefice void by the 21. *Hen.* 8. c. . but ſhould be left as it was at the common law before the ſtatute; and that the taking of a ſecond benefice makes not the firſt void *quoad* the patron until deprivation, as it is in 4. *Co.* 75. *b.* in *Holland's Caſe*: and then the second queſtion, Whether the collation by the biſhop, in the time of the archbiſhop's viſitation and after inhibition, will not be material. Wherefore it was adjudged for the defendant.

Case 5.

Baker *againſt* Willis and Others.

Eaſter Term, 11. *Car.* 1. *Roll* 46.

The king is bound by the ſtatute 32. *Hen.* 8. c. 28. ſ. 6. although he is not named in it; and therefore if a huſband levy a fine of the wife's land to the king, yet the wife may enter after the death of her huſband.

S. C. Jones, 393. S. C. 2. Roll. Ab. 357. 9. Co. 138. b. 2. Roll. Rep. 490. Hutton, 84. Co. Lit. 28. b. Hargrave's edit. note (1). Cowp. 201.

Ejectment upon a leaſe for ſeven years of a meſſuage and lands in *Murial Grange*, in the pariſh of *Belton*. Upon not guilty pleaded, and a ſpecial verdict found, the caſe was, *John Beamond* and *Elizabeth* his wife, tenants in tail to them and the heirs of their bodies, of the gift of *Sir Humphry Foſter*, remainder to the right heirs of the ſaid huſband, the ſaid *John Beamond* having iſſue betwixt them *Francis Beamond*, in 6 *Edw.* 6. levies a fine *ſur cognuſance de droit come ceo* to king *Edw.* 6. with proclamations. The king, in the ſeventh year of his reign, grants thoſe lands to *Francis Earl of Huntingdon* and his heirs: afterwards, in 2. *September*, *anno* 5. & 6. *Phil.* & *Mary*, the ſaid *John Beamond* died. Upon the tenth of *September* the ſame year *Elizabeth* enters, and *Francis Earl of Huntingdon* died ſeiſed of the reverſion, which deſcended to *Henry Earl of Huntingdon*, who by indenture betwixt him and the ſaid *Elizabeth* (in 16. *Reg. Eliz.*), reciting that the ſaid *Elizabeth* held the tenements in tail of the gift of *Sir Humphry Foſter*, remainder expectant to the right heirs of the *Earl of Huntingdon*, ratifies, allows, and confirms to the ſaid *Elizabeth* all her eſtate, title, and intereſt in the ſaid tenements, *habendum et tenendum* the ſaid tenements to the ſaid *Elizabeth* and the heirs of the body of her; and the ſaid *John Beamond* engendered with warranty of the ſaid tenements

BAKER *against* WILLIS and OTHERS.

ments to the said *Elizabeth* and the heirs of the body of her; and the said *John Beamond* engendered against him and his heirs. *Elizabeth* dies 29. *Eliz.* *Francis Beamond* enters, and hath issue *Sir Henry Beamond*, *Sir John Beamond* and *Francis Beamond*, and dies 41. *Eliz.* *Sir Henry Beamond* by indenture covenants to stand seised to the use of himself and the heirs males of his body, remainder to *Sir John Beamond* his brother and the heirs males of his body, and afterward dies without issue male; his wife *enseint* with a daughter (afterward called *Barbara*), the wife of *Woolstan Dixy* the lessor: afterward *Sir John Beamond* died, and had issue *Sir John* , who entered and let to the defendant; and *Woolstan Dixy* entered in right of his wife, and let to the plaintiff, *prout* in the declaration, who entered, and the defendant ousted him.

The question was, Whether the plaintiff hath any title?

It was divers times argued at the bar, and now at the bench by BERKLEY, that judgment ought to be given for the defendant.

FIRST, Because the fine with proclamations did bar the estate tail, which *John Beamond* and the heirs of the body of *John Beamond* and *Elizabeth* claimed; for he being barred as heir of the body of his father, can never claim that estate; for he is barred by the acts of parliament 4. *Hen.* 7. c. 24. and 32. *Hen.* 8. c. 28.: and he much insisted upon the validity of fines, that they be perpetual bars against the heir in tail of him who levies the fine.

SECONDLY, He argued that *Elizabeth*, by her entry immediately after the death of her husband, reduced the estate tail back to her, and it was lawful and saved to her by the statute of 4. *Hen.* 7. c. of Fines, and by the statute of 32. *Hen.* 8. c. 28. of Discontinuance: and that she was tenant in tail, and not tenant in tail after possibility, as it hath been argued at the bar, nor in nature of such a tenancy in tail, but an absolute tenant in tail to all purposes.

Lands given during coverture to husband and wife in tail special is an inheritance to the wife within 32. *Hen.* 8. c. 28. 9. Co. 138. Brownl. 131.

2. Inst. 681. Co. Lit. 326. 8. Co. 72.

THIRDLY, That the tail is so barred by the fine, and the acts of 4. *Hen.* 7. c. 24. and 32. *Hen.* 8. c. 28. that he cannot claim, for he is a person disabled to claim; as a person attainted, although he hath a pardon, cannot claim by descent: and as one presented by simony to a benefice, being void, cannot be presented to it again, for he is a person disabled by the act of parliament; and by the confirmation to *Elizabeth*, *nihil operatur* to her, nor to the heirs of the body of her and *John Beamond*, because he in reversion had but a possibility to have it after the death of *John Beamond* without issue, and during the time he had issue he might not claim: and a possibility cannot be transferred to another: and *John Beamond* who entered shall have it as an occupant; for the heir general is barred by the fine, and he in reversion cannot have it, as long as there is any heir of the body of *John Beamond* and *Elizabeth in esse*, and any who enters shall have it as an occupant, as in the case 29. *Assise*. Wherefore he concluded, that judgment should be given for the defendant; for he had the priority of possession.

If husband and wife be tenants in tail, and the husband alone levies a fine, it is a good bar to all their issue. Co. Lit. 8. 120. a. 7. Co. 32. 9. Co. 141. 11. Co. 68. 12. Co. 100. Cro. Jac. 385. Hob. 75. 165. 1. Roll. Ab. 370.

But

If husband and wife be tenants in tail, and the husband alone levy a fine, it bars all the issue; but the wife may enter within five years after the death of her husband, and this entry will revive the estate tail as to her, so as to render her capable of receiving a confirmation of it from the reversioner. Ante, 435.

But *I* argued to the contrary, that judgment ought to be given for the plaintiff. FIRST, *I* agreed, that the fine with proclamation was an absolute bar and discharge of the estate tail against *John Beamond* and the heirs of his body, by the express words of the statute of 32. *Hen.* 8. c. . and it is *quasi* extinct against him by the fine, 3. *Co.* 51. *Sir George Brown's Case*, and 5. *Hen.* 7. 30.—SECONDLY, *I* agreed, that when *Elizabeth* entered within the five years after the death of *John Beamond*, who levied the fine, she is absolute tenant in tail; for the fine *quoad* the said *Elizabeth* is absolutely avoided, and she is in as in her former estate, which is an absolute estate tail, and no tail after possibility of issue extinct; and if she be to sue any real action, she is to name herself tenant in tail. *Dyer*, 331. and 351.—THIRDLY, That notwithstanding the estate tail is barred by the fine, yet this confirmation, being by indenture, hath revived the estate tail; for although he in reversion, by reason of the fine, may enter and have the land, and the issue after the death of the wife is barred to claim it, yet by this confirmation he in reversion hath excluded himself against his confirmation to claim it, for he may exclude himself of his estate; and as he may avoid, so he may confirm. 1. *Co. Mayo's Case*, 11. *Hen.* 7. 28. *F. N. B.* 98. a. where tenant in ancient demesne levies a fine, &c.: and although at the time of the confirmation he had nothing to confirm, and his words of confirmation will not add to the estate of the wife, who had an estate tail, yet by the words "*habendum the* "*tenements*" there is a new estate tail extracted out of the reversion, and settled in *Elizabeth*, so as that confirmation is *quasi perficiens et crescens*; and as the case in *Littleton*, 525. *feme* tenant for life takes an husband, a confirmation to the husband and wife, "*habendum* "*the land to them*," increaseth the estate to the husband. 9. *Co.* 139. b. And whereas it was held, that she had as great an estate before as she had by the confirmation, and therefore the confirmation was void, *I* held, that although she had an estate tail, yet she takes by the confirmation; for a deed shall never be void when by any intendment it may be allowed to be good, and to have any operation: and she takes it for the benefit of the heirs of her and her husband's body; and although the heir be barred by the fine, yet he is restored to the estate tail by the confirmation; for as the fine was an estoppel to the heir to claim against the fine, so the indenture of confirmation is an estoppel to him in reversion, to say that he shall not hold it in tail, and there it is an estoppel against an estoppel, which sets the matter at large, as it is *Co. Lit.* 352. b. 12. *Hen.* 7. 4. And although it was said by my brother BERKLEY, that the *Earl of Huntingdon* hath but a possibility to have it after the death of *Elizabeth*, and that he hath it but as an occupant, to have and enjoy it during the time that *John Beamond* had issue of the said *Elizabeth*, *I* utterly denied that he hath but a possibility; for he hath it as in right of his reversion, if his confirmation had not barred him; and that appears by *Austin's Case* (*a*), and in *Husley's Case* (*b*), where an estate is barred, or discharged, or extinct, as *Sir George Brown's Case* (*c*) terms it, where he in reversion shall have it as in point of reversion; and if he hath but a possibility, yet that may be well transferred by confirmation or release to him who hath the pos-

2. Co. 72. 9. Co. 140, 141. 10. Co. 50. Cro. Jac. 689. Comp. 201.

(*a*) Plowd. (*b*) Cro. Eliz. 519. (*c*) 3. Co. 50.

session

Baker against Willis and Others.

ſeſſion of the land, as it is reſolved *Fulwood's Caſe* (*a*), and *Lampet's Caſe* (*b*). And as it is holden *Corbet's Caſe* (*c*), that there is no condition, proviſo, or any other title but may by apt words be determined the one way or the other, ſo here every part agreeing, the eſtate tail ſhall be revived, or at leaſtwiſe newly created, and the law ſhall adjudge it according to their intereſt; and therefore *I* was of opinion, that judgment ſhould be given for the plaintiff.

But Jones and Brampston, *Chief Juſtice*, deferred their arguments that day, hearing that the parties were about agreement: and afterward, by our means, they compounded, and *Sir John Beamond* agreed to pay 5000l. and the others agreed to aſſure the eſtate by fine, or otherwiſe, &c. *Et ſic materia prædicta ſopita fuit*, and no judgment given. But Jones told me, that he was clear of opinion, that the plaintiff had good title, and that the confirmation was good, and created a good eſtate in *Elizabeth*, deſcendible to her heirs.

(*a*) 4. Co. 64. (*b*) 10. Co. 48. (*c*) 1. Co. 83. b.

Michaelmas

Michaelmas Term,

13. Car. 1. In the King's Bench,

Sir John Brampſton, *Knt. Chief Juſtice.*
Sir William Jones, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Robert Berkley, *Knt.*
Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

Ceely *againſt* Hopkins.

To accuſe a perſon of having bewitched another is actionable. *Vide* ante, 474. Jones, 396. 2. Roll. Ab. 46.

THIS Caſe was now moved again by GERMYN, *Serjeant*, and preſſed to have judgment.—And ALL THE COURT reſolved, Foraſmuch as the words are, "bewitched me and "my aunt," and ſhe is found guilty of malicious ſpeaking of them, it ſhall be intended and conceived to be ſpoken according to the common ſenſe of bewitching their perſons, and not of bewitching with fair words. Whereupon judgment was given for the plaintiff.

CASE 2.

Sherlock *againſt* Chandler.

Hilary Term, 12. *Car.* 1. *Roll* 618.

Venire facias. Ante, 17. 162. S.C. Jones, 395. 2. Roll. Ab. 612. Cro. Jac. 8. 150. 326. Co. Lit. 125. a.

ERROR to reverſe a judgment in *replevin*. The error aſſigned by GRIMSTON was in the miſ-trial of the iſſue, Becauſe the iſſue being, Whether lands in *Bromley* were held of the manor of *Webbs* by ſuch ſervices, the *venire facias* was awarded *de vicineto de* BROMLEY, where it ought to be *de vicineto* of the manor, or *de vicineto de* BROMLEY and of the manor?—And ALL THE COURT, *abſente* BRAMPSTON, held, that the trial by the common law ought to have been *per vicinetum* of both; and that ſuch a miſ-trial had been cauſe of reverſal, &c.: but it is aided by 21. *Jac.* 1. c. 13. which points, that if a trial is to be of ſeveral places, it ſhall be tried *per vicinetum* of any of the places; and it is well enough.

CASE 3.

Seaman *againſt* Bigg.

Trinity Term, 13. *Car.* 1. *Roll* 1009.

To ſay of a ſervant who is in an employment of truſt and confidence, that "*he* "*is a cozening* "*knave, and* "*hath cheated* "*his maſter*," is actionable. Poſt. 563. 1. Roll. Ab. 43. 2. Lev. 214. 1. Com. Dig. 179. 1. Ter. Rep. 110.

ACTION FOR WORDS. Whereas the plaintiff was ſervant in huſbandry to *J. S.* and was his bailiff, and in great truſt with him, and thereby got his means and maintenance; that the defendant, to diſgrace and diſcredit him with his maſter and others, ſpake of him theſe words, "Thou art a cozening knave, and haſt "cozened thy maſter," *innuendo* the ſaid *J. S.* "of a buſhel of "barley." The defendant makes juſtification; and it was found againſt him.

FARRER now moved in arreſt of judgment, that theſe words are not actionable; for no action lies for calling one "cozening "knave," or, "cheating knave."

But

But ALL THE COURT, *abſente* BRAMPSTON, held, That true it is, generally an action will not lie for calling one "cozening knave;" yet where the words are ſpoken of one who is a ſervant and accomptant, and whoſe credit and maintenance depends upon his faithful dealing, and he by ſuch diſgraceful words is deprived of his livelihood and means of maintenance, there is good reaſon it ſhould bear an action, that he might have recompence for loſs of his credit and means. Wherefore it was adjudged for the plaintiff. SEAMAN *againſt* BIGG.

South and Others, Bail for Jefferſon, at the Suit of Gryffith. CASE 4.

Hilary Term, 12. Car. 1. Roll 559.

ERROR of a judgment in the common pleas, brought by the bail. The writ ſuppoſeth, that the error was in the principal judgment; and alſo in the judgment upon the *ſcire facias* againſt the bail, "*et in redditione executionis ſuperinde.*" The error was aſſigned in the execution againſt the bail, that no *capias* was awarded againſt the principal.

A *ſcire facias* againſt bail cannot be had until a *capias* againſt the principal is returned *non eſt inventus*. Poſt. 561.

JONES ſaid, It was a queſtion ſtirred in the common pleas, Whether an execution might be in the common pleas againſt the bail, where no *capias* iſſued againſt the principal?

Jones, 396. 1. Roll. Ab. 333. 749. 779. 884. 2. Leon. 101.

HOBART, *Chief Juſtice*, was of opinion, that it might, becauſe the recognizance by the bail in the common pleas differs from the courſe of the bail in the king's bench; for there the recognizance is in a ſum certain, that the principal ſhall render his body.

1. Saund. 299. Salk. 599, &c. 2. Lut. 1273. Gilb. Ex. 98. 1. Com. Dig. 478. 498.

But ALL THE OTHER JUSTICES there held, that it is all one in the common pleas and in the king's bench, that a *capias* againſt the principal ought to be taken forth, and returned *non eſt inventus*, otherwiſe no *ſcire facias* ought to be againſt the bail; for if the principal be taken by the *capias*, or that he render himſelf to priſon upon the judgment, then no execution ought to be againſt the bail.

Ld. Ray. 28. 1. Wilſ. 269. Tidd, 129, 130.

ALL THE COURT here were of the ſame opinion.

Then it was moved, that this writ of error was ill, becauſe the writ of error is brought by the bail for error in the principal judgment, which the bail cannot have.—And thereto THE COURT agreed, that the bail cannot aſſign error in the principal judgment, nor can take advantage of any error therein.

Bail cannot have *error* of the *principal judgment*. Poſt. 561. Cro. Jac. 171. 1. Roll. Ab. 749. 2. Leon. 101. Carth. 447. 1. Salk. 89. 603. 5. Mod. 397. 6. Mod. 304. Comb. 149. 161. 1. Com. Dig. 498. 5. Com. Dig. 291. 1. Term Rep. 624. 3. Term Rep. 79.

AND THEY FURTHER HELD, that if the writ of error had been brought for error only in the principal judgment, it had been clearly ill.—But becauſe the writ of error ſuppoſeth error in the principal judgment, and alſo in the judgment upon the *ſcire facias* againſt the bail, as alſo in *redditione executionis ſuperinde*, JONES held, that the writ of error will lie for that part, and ſhall be void for the reſidue. But BERKLEY and MYSELF, BRAMPSTON *being abſent*, were of opinion, that the writ was ill, and ſhould abate in all, becauſe it is grounded upon the firſt judgment, and alſo upon the judgment in the *ſcire facias*; and ſo coupling them together, all is void: but if the bail in their writ of error had recited the firſt judgment

South and Others, *againſt* Gryffith.

ment (as of neceſſity they muſt make mention thereof), and the ſecond judgment in the *ſcire facias*, and alledged error in that judgment and in the execution thereof, &c. it had been well enough

Case 5.

Sacheverill *againſt* Porter.

Trinity Term, 11. *Car.* 1. *Roll* 324.

Common appurtenant is claimable by an exiſting *grant* as well as by *preſcription*, though only part of the land is ſtated in the pleadings to be conveyed by *feoffment*, without ſaying by deed.

S. C. Jones, 397. 2. Roll. Ab. 400. 2. Roll. Ab. 60. Co. Lit. 122. a. 126. b. 8. Co. 79. a. 1. Roll. Rep. 234. 2. Com. Dig. 427.

TRESPASS *quare clauſum fregit, et cum averiis depaſc. &c.* Upon a ſpecial verdict the caſe was, That one

FULK, of *Peterborough*, and others were ſeiſed in fee of the place WHERE, being a great waſte called *Atterhall-heath*; and being ſo ſeiſed, 2. *Hen.* 4. granted by deed indented to the prior and convent of *Stone* (who were ſeiſed in fee of three meſſuages, one hundred acres of land, thirty acres of meadow, and fifty acres of paſture, in *Stallington*) common for him, "*et omnibus tenentibus ſuis in* STALLINGTON *pro omnibus averiis ſuis communicabilibus omni tempore anni* "*in prædicto vaſto*, HABENDUM the ſaid common of paſture to "the ſaid prior and convent, *et ſucceſſoribus et tenentibus ſuis in per-* "*petuum.*" The priory being diſſolved, the king grants the ſaid tenements, with all commons to them appertaining and therewith enjoyed, to *Rowland Hill* and his heirs; who by feoffment conveys three-and-thirty acres, parcel of thoſe tenements, *cum pertinentiis*, to the defendant; who therefore juſtifies the uſing of the ſaid common appurtenant.

THE QUESTION was, Whether common created 2. *Hen.* 4. and ſo within time of memory granted to the prior and tenants, &c. may be ſaid common appurtenant to the ſaid tenements in *Stallington?*

RESOLVED, That it may; for being granted to him and his tenants of *Stallington*, it is common appurtenant, and may paſs by feoffment as common appurtenant, together with the ſaid tenements.

SECONDLY, Although but part of the land is conveyed, and not the entire, yet it is common appurtenant, as common for the beaſts *levant et couchant* upon the ſaid tenements, and well ſhall paſs with them by the words *cum pertinentiis*; and although it be common created within time of memory, it is common appurtenant, and may be well apportioned. *Vide* 8. *Co.* 78. *Weild's Caſe.*

THIRDLY, Although the pleading and verdict is, that feoffment was of part of the ſaid lands, and doth not ſay that it was by deed, yet it is good enough. Wherefore it was adjudged for the defendant. *Vide* 36. *Aſſ.* 3. 15. *Aſſ.* 11.

Ante, 162. 181. Cro. Jac. 481.

Case 6.

Lady Fulwood's Caſe.

Vide Poſt. 484. 488. 492.

Counſel aſſigned on an indictment on 3. *Hen.* 7. c. 2. for forcible marriage, to a copy of the

LADY FULWOOD, *Roger Fulwood* her ſon, one *Richard Bower*, and divers others, not priſoners but at large, were indicted in the county of *Surrey*, That WHEREAS *Sarah Coxe* was a maid, who

adviſe (upon points ſtated) what ſhould be pleaded in matter of law; and, upon prayer, indictment was granted.

had

had a portion of thirteen hundred pounds, the ſaid *Roger Fulwood*, by the procurement and abetting of the ſaid *Lady Fulwood*, at the pariſh of *St. Saviour's*, violently, and with force, and againſt the will of the ſaid *Sarah*, took and carried the ſaid *Sarah* to *St. Saviour's*, and there married her, by the aid and procurement of the ſaid other perſons, againſt the form of the ſtatute in that caſe provided. Upon this indictment they being arraigned, pleaded "*not* "*guilty*," and put themſelves upon the country. LADY FULWOOD'S CASE. 2. Hawk. P. C. 312. 565.

The ſaid *Roger Fulwood*, *Richard Bowen*, and one *John Hoxton*, a coachman, were indicted in the county of *Middleſex*, For that the ſaid *Sarah* being a perſon having a portion of thirteen hundred pounds, for lucre of the gain of the ſaid portion, they took her at *Newington* in the county of *Middleſex*, againſt her will, and carried her to *St. Saviour's* in the county of *Surrey*, and there the ſaid *Roger Fulwood*, by the aid, abetment, and procurement of the ſaid *Bowen* and others, married the ſaid *Sarah* in the ſaid pariſh of *St. Saviour's*, in the county of *Surrey*, againſt the form of the ſtatute in that caſe provided. The ſaid defendants being arraigned upon this indictment, prayed counſel to be aſſigned them, to be adviſed what they ſhould plead, for matter in law; for it was pretended, that this taking in one county and marrying in another county was not triable in the county of *Surrey*.

HOLBOURN and HENDEN, *Serjeant*, were thereupon aſſigned of counſel with them. And they alledged, that in the caſe of one *Bruton* it was reſolved, upon a reference out of the ſtar-chamber, by all the Juſtices, that the taking away of a woman, unleſs ſhe be married or defiled, is not felony within the ſtatute: and hereupon the counſel prayed, that they might have a copy of the indictments. —And it was allowed by the Court, that they ſhould have a copy of the indictment in *Middleſex*, but not of the indictment in *Surrey*.

Sir John Fitzherbert *againſt* Sir Edward Fitzherbert and Others.

CASE 7.

EJECTIONE FIRMÆ. Upon evidence to the jury, it was reſolved by all the Court, Whereas *Sir Thomas Fitzherbert* and *Sir John Fitzherbert* his brother, being tenants for life, the one in remainder after the other, the remainder in tail to *Thomas Fitzherbert*, their nephew, upon purpoſe to bar this intail, the 1ſt *October* 25. *Eliz.* made a leaſe for years, with agreement that the leſſee ſhould make a feoffment of this land, who accordingly the 12th *October* made the feoffment; and afterward, on the 17th *October*, *Sir Thomas Fitzherbert* releaſed to the feoffee with warranty, and on the 19th *October Sir John Fitzherbert* releaſed to the feoffee with warranty, and both theſe warranties deſcended upon *Thomas Fitzherbert* in remainder: RESOLVED, That theſe warranties were warranties commencing by diſſeiſin, although they were created ſeven days after the feoffment; for the feoffment was made by covin and with an intent and agreement precedent, that there ſhould be ſuch a feoffment and releaſes made after; and they be all but as one act, grounded upon this fraud and practice, and ſhall not bind him in remainder (*a*).

Tenant for life makes a leaſe. The leſſee, as *by private agreement*, enfeoffs a ſtranger. The tenant for life releaſes to the ſtranger with warranty. This is a warranty commencing in diſſeiſin, and ſhall not bind him in remainder.

Co. Lit. 49. a. 367. a. S. C. Jones 397. 5. Co. 79. Cowp. 701.

(*a*) Ante, 306.

SECONDLY,

If after this ſecret diſſeiſin the remainder-man had levied a fine to the ſtranger, it would have enured to the *conuſor*.

Jones, 316. Co. Lit. 49. note (4). Goldſb. 162. 2. Co. 56. 1. Lev. 128.

SECONDLY, It was moved, if *Thomas* after this diſſeiſin, not knowing of the diſſeiſin, had levied a fine to the ſtranger, Whether that ſhould have barred his right, and enured to the benefit of the diſſeiſor, according to 2. *Co.* 56. a. *Buckler's Caſe*, which, if admitted, would be of a very miſchievous conſequence?—But herein THE COURT delivered no opinion. But BRAMPSTON and MYSELF conceived, that it ſhould not enure to the benefit of the diſſeiſor, but to the uſe of the conuſor himſelf; for otherwiſe a diſſeiſin being ſecret may be the cauſe of diſinheriſon of any one who intends to levy a fine for his own benefit, for aſſurance of his lands upon his wife and children, or otherwiſe.

3. Com. Dig. 361.

CASE 8.

Moulin *againſt* Sir George Dalliſon.

The exiſtence of a cuſtom of *Borough Engliſh*, by which the eldeſt daughter ſhall inherit, is a queſtion of fact for the jury.

Co. Lit. 140. b. 1. Com. Dig. 608.

THE queſtion was, Whether the manor of *Sherfield* was by cuſtom deſcendible to the eldeſt daughter? The plaintiff, to prove this cuſtom, ſhewed, that it was parcel of the manor of *Odiham*, which is *ancient demeſne*, in which manor the cuſtom is, that lands are deſcendible to the eldeſt daughter.

But on the other part was ſhewn, that it cannot be parcel of the manor of *Odiham*, becauſe it appears by divers records that this manor of *Sherfield* was held of the king by *grand ſerjeanty*; and although it was agreed on both parts that there is ſuch a cuſtom within the manor and vill of *Odiham*, yet foraſmuch as the manor of *Sherfield* holds by ſuch ſervice, it cannot be parcel of the manor of *Odiham*.

But to that was anſwered, That this tenure in grand ſerjeanty was created by king *Edward* the ſecond: and if there were ſuch an ancient cuſtom, it cannot be deſtroyed nor altered by alteration of the tenure;—which was agreed by ALL THE JUSTICES. Whereupon, becauſe divers precedents were ſhewn that lands of the freeholders uſed to deſcend there to the eldeſt daughter, and lands in *Sharfield* uſed to be recovered by a writ of right cloſe, in the court there, it was left to the jury to enquire, Whether there were any ſuch cuſtom?

A juror cannot be withdrawn except by conſent. (*a*) Co. Lit. 227. 10. Co. 104. Carth. 465. Foſter, 16. 39. 76. 328.

And becauſe the jurors, lying all night, could not agree, a juror by conſent was drawn (*a*).

A defendant cannot have a new trial the ſame Term. *Sed vide* 10. Co. 104. 2. Roll. Abr. 671. 2. Hawk. P. C. 575.

Afterwards the defendant prayed a new trial, and a *tales* by proviſo:—but it was held by ALL THE COURT, that the defendant could not pray a *tales* this Term, but he might in another, &c.

CASE 9.

Lady Fulwood's Caſe.

Ante, *Page* 482. *Poſt*. 488. 492.

An indictment on 3. *Hen.* 7. c. 2. muſt charge that the defendants took and carried away the woman with intention to marry *or* defile her. *Sed vide* poſt.—1. Hale, 660. 5. St. Tr. 468. Hob. 182. Daliſ. 22. 3. Inſt. 61. Sum. 128.

THE precedents of the court were ſearched, and one caſe was found in *Eaſter Term*, 31. *Hen.* 8. *Roll* 14. among the pleas of the crown, where *Henry Sturges* and *Philip Sturges* were indicted for the taking of one *Agnes Hobſon* againſt her will, who

was

was the daughter and heir of *John Hobſon*, who was ſeiſed of lands to the value of twenty pounds a-year: and they pleaded to the indictment, that they ought not to anſwer, becauſe it is not alledged in the ſaid indictment, "*quòd ceperunt ad intentionem maritandi prædictam* AGNETEM *vel ad proſtituendam, &c.*;" and they were diſcharged. LADY FULWOOD'S CASE.

Another record was ſhewn in *Hilary Term*, 3. & 4. *Phil. & Mary*, *Roll* 10. where *Roger Thompſon* and *Peter Rewley* were indicted, For that they feloniouſly did take *Margaret Burton* and *Margery Burton*, daughters and coheirs of one *Roger Burton* deceaſed, and againſt their wills, &c. And they pleaded, they ought not to anſwer to the ſaid indictment, *pro eò quòd non apparet in quo loco nec quomodo* they took the ſaid daughters; and becauſe it was not alledged in the ſaid indictment that the ſaid *Roger* or *Peter* married or defiled the ſaid *Margaret* or *Margery*.—*Ils alers ſans jour*. An indictment on 3. *Hen.* 7. c. 2. muſt ſtate the *place* and *manner* of taking, and alledge that the woman was married or defiled. Hob. 182.

NOTE, That LORD HOBART ſets down (*a*), that one *Bruton* exhibited his bill in the ſtar-chamber againſt *Edmund Morice* for ſtealing away his daughter, he being ſeiſed of lands and having goods to the value of five thouſand pounds, and ſhe was not his heir, for he had a ſon: and ſhe was enticed away by friendſhip, and then by force carried into *Suffolk*, and there married; and, Whether this were within the ſtatute of 3. *Hen.* 7. c. 2.? was referred to the two Chief Juſtices, and to have the opinion of the other Juſtices. And they all upon peruſal of the ſtatute and view of precedents reſolved, that it was not within the ſtatute: for although they held, that the party being firſt taken away with her own conſent, and after by force carried into *Suffolk* (from which time the forcible taking began), was forcible taking away within the intent of this act; and although the words in the purview ſeem to be general, and to extend to all women unlawfully taken againſt their wills; yet conſidering that the preamble of the ſtatute cannot be conceived to be idle, but muſt be intended to reſtrain the purview to the particular caſes in the preamble mentioned, that is to ſay, that they ſhall be maids, widows, or wives, having their ſubſtance in lands or goods, or otherwiſe heirs apparent, that the motive be lucre, and the end to be married or defiled; and the purview, that what perſon or perſons ſhould ſteal away a woman *ſo* againſt her will unlawfully, &c. it was conceived, that this word "*ſo*" did imply and bind up the preamble to the purview, otherwiſe the word *ſo* were idle and might have been ſpared, if it did not declare the motives and the ends of the action, which in this caſe are lucre and luxurioufneſs. Precedents were ſhewn in *Eaſter Term*, 9. *Hen.* 7. an indictment againſt *Hyelord* and others; and in *Hilary Term*, 3. & 4. *Phil. & Mary*, againſt *Polley*, wherein no mention is made that they were entitled to lands or goods, or that they were heirs apparent; but there were ſeven or eight precedents ſhewn wherein it was mentioned. An indictment on 3. *Hen.* 7. c. 2. muſt expreſsly alledge that the woman taken away had land or goods, or was heir apparent; for the enacting clauſe, by making the offence to be the taking of a woman *ſo* againſt her will, clearly refers to the preamble. 3. Inſt. 61. 1. Hale, 660. 7. Mod. 701. Hob. 182. 1. And. 115. Savil, 59. 12. Co. 20. 100. 110. 1. Hawk. P. C. 171. 5. St. Tr. 450. 3. Bac. Ab. 577.

(*a*) Hobart, 182.

To take a woman forcibly away, unleſs ſhe be afterward married or defiled, is not felony.

Hob. 182, 183. 1. Hale, 66. 1. Hawk. P. C. 172.

And in LORD ANDERSON'S REPORTS, in *Hilary Term* 16. *Eliz.* it was agreed by the Juſtices, that if a woman be taken againſt her will and enforced to contract herſelf in marriage, yet is not married, it is no felony; but if ſhe be married or defiled, it is felony: and there it was ſaid, that if the taking of ſuch a woman, and the marrying or defiling be in ſeveral counties, it is felony compounded of all the three parts; as ſtroke and death are but one murder. —*Reſiduum poſtea, page* 488. 492.

CASE 10.

Sydnam and Parr's Caſe.

Michaelmas Term, 12. *Car.* 1. *Roll* .—*Surrey.*

If a perſon *poſſeſs* land, enter it forcibly, and *detain* it from a perſon claiming right of common therein, he cannot be committed by a juſtice on view, by virtue of 15. *Rich.* 2. c. 2. for a *forcible detainer*. Ante, 201.

Dalt. c. 77. Crompt. 70. b. Dyer, 141. 1. Hawk. P. C. 275. 282. 3. Com. Dig. 364. 2. Stra. 794.

SYDNAM and PARR were brought to the bar by *habeas corpus*; wherein was returned, That they were committed to gaol by one *Read*, juſtice of peace of the ſaid county, by force of the ſtatute of 15. *Rich.* 2. c. 2. upon complaint of one *J. S.* that he claimed common in a meadow of the ſaid *Sydnam*'s, called *Monk's Meadow*; and that the ſaid *Sydnam* and *Parr* entered into the ſaid meadow, and kept him out from his common with force and arms: wherefore he was prayed to view the force, and that he came thither, and found them holding the ſaid meadow with force; whereupon he by virtue of the ſaid ſtatute committed them to gaol.—Upon the motion of GRIMSTON, and reading the return, ALL THE COURT (BRAMPSTON *being abſent*) held, this commitment was not warranted by that ſtatute: for although one may be diſſeiſed of a rent or common by force, which is enquirable in aſſizes, and puniſhable if it be found, yet one may not be indicted or committed for entering his own land with force, or holding his own land with force, againſt a commoner; for it ought to be *ubi ingreſſus non datur per legem*, and one in his own land may enter lawfully, and may detain with force againſt any who pretend to have common there, he being allowed to be owner of the ſoil: and this ſtatute is not to be extended againſt any but him who enters unlawfully, and ouſts another of his lawful poſſeſſion: wherefore the cauſe of committing and detaining them in priſon was held unlawful, and the priſoners were diſcharged.

CASE 11.

Bower and his Wife *againſt* Cooper.

Precedendo granted in a cauſe removed by *habeas corpus* from LONDON for calling a woman "A WHORE." Ante, 350.

1. Roll. Ab. 550. 2. Roll. Ab. 69.

ACTION ON THE CASE in *London* for theſe words ſpoken of the wife, "Thou art an whore, and a twopenny whore."

Upon an *habeas corpus* this cauſe being removed, *I* ſigned a *precedendo*, becauſe *I* was informed it is good cauſe of action in *London* by the cuſtom; for they ought to puniſh ſuch perſons there with carting and whipping, and that it lies not in this court.

PHESANT now moved to have a *ſuperſedeas*, and the cauſe removed; for he ſaid, it was againſt law to ſuffer ſuch actions to be proſecuted in *London* upon pretence of a cuſtom, where they are not maintainable in the ſuperior courts; and that for calling one "whore," or "adulterer," and the like, an action lies not at the common law. *Vide Regiſter*, 54. 4. *Co. Murford's Caſe*, where for theſe words it was held an action lies not.

STONE

STONE prayed, that no *ſuperſedeas* might be granted; for he ſaid, an action lies in *London* for theſe words by the cuſtom, becauſe an whore there is to ſuffer corporal puniſhment, *viz.* carting and whipping: and it is an offence preſentable at the wardmote's inqueſt, and there puniſhable; ſo, being ſubject to a corporal puniſhment, it is reaſon ſhe ſhould have her action there: and if the party conceives himſelf grieved, he may have a writ of error; and if againſt law, may reverſe it: and he cited a caſe in *Trinity Term*, 8. *Car.* 1. where ſuch a cauſe being removed by *habeas corpus*, a *procedendo* was awarded in this court upon debate.

BOWER and his WIFE *againſt* COOPER.

4. Co. 18. Cro. Jac. 485. Lev. 116. Carth. 75. 213. 1. Com. Dig. 180. But ſee the caſe of Staunton v. Jones, Douglas, 380, 381. *notis.*

And ſo ALL THE COURT held here, except BERKLEY, who conceived, that a *ſuperſedeas* ought to be granted.

STONE alledged, that by the ſtatute of 21. *Jac.* 1. c. 23. after a *procedendo* is granted, no *ſuperſedeas* ought to be awarded.—But THE WHOLE COURT was againſt him in that point; for when a *procedendo* unduly *vel improvidè emanavit*, the uſe is to grant a *ſuperſedeas*.

A *ſuperſedeas* may iſſue after *procedendo* awarded.

But here it was conceived by JONES, BRAMPSTON, and MYSELF, that the *procedendo* was well awarded; therefore we denied to grant a *ſuperſedeas*.

Kinnion *againſt* Davies.

CASE 12.

Trinity Term, 12. *Car.* 1. *Roll* 1096.

ERROR of a judgment in the common pleas in an action on the caſe, For that the defendant a certain dog *ad mordendum oves conſuetum* at HINDON *ſcienter retinuit et cuſtodivit*; which ſaid dog ſuch a day and place one hundred ſheep of the plaintiff's then and there found *tam graviter momordit*, that twenty of them died of the ſaid biting, and the others were much hurt. Judgment being given there by default,

An action on the caſe for knowingly keeping a dog uſed to bite ſheep, &c. muſt aver that the party *knew* he was uſed to bite ſheep.

Ante, 254.

GRIMSTON aſſigned for error, That the declaration was not good; for he doth not ſhew, according to the uſual courſe, "*quòd ſciens* "*canem prædictum ad mordendum oves conſuetum ſcienter retinuit*;" for it may be that he knowingly kept the dog, and yet knew that he was uſed to worry ſheep; which is the main point of the action.

1. Roll. Ab. 4. Dyer, 25. 4. Co. 18. b. Hob. 134. Cro. Jac. 45. 1. Vent. 295. Latch. 119. 2. Lev. 172. Lut. 90. Salk. 662.

ALL THE COURT, *abſente* BRAMPSTON, upon reading the declaration, held, that it was not good. Whereupon rule was given, that the judgment ſhould be reverſed, unleſs, &c.

Strange, 1264. Ld. Raym. 608. 1. Com. Dig. 208. 3. Bl. Com. 153.

Case 13.

The Case of Fulwood.

Ante, Page 482. 484. *Post.* 492.

On an indictment for forcible marriage, it is no excuse that the woman at first consented, if she afterwards refused, and was forced against her will.

ROGER FULWOOD, RICHARD BOWEN, and LADY FULWOOD were indicted by a jury of *Surry*; wherein was supposed, that the said *Roger Fulwood*, *Richard Bowen*, *Lady Fulwood*, and others, upon the twenty-third of *Auguſt*, in the ninth year of *Charles* the firſt, at *Southwark*, in the county of *Surry*, *violenter et felonicè* aſſaulted one *Sarah Coxe*, and her there took away by force and againſt her will; and the ſaid *Roger Fulwood*, the 23d of *Auguſt* the ſame year at *Southwark*, married her the ſaid *Sarah Coxe*, by the abetment and procurement of the ſaid *Bowen* and *Lady Fulwood*.

Upon this indictment, being arraigned, they pleaded *not guilty*; and now by a jury of the county of *Surry* they were tried; and upon evidence it appeared, that the ſaid *Sarah* being an orphan, and having thirteen hundred pounds for her portion, was by force, with ſwords drawn, at *Iſlington*, in the county of *Middleſex*, taken away againſt her will by the ſaid *Roger Fulwood* and *Richard Bowen* at eight of the clock at night, and put into a coach with the ſaid *Roger Fulwood* and brought to the *Strand-bridge*, and from thence carried by water to the *Biſhop of Wincheſter*'s houſe; and the next day, being the 23d of *Auguſt*, upon pretence of ſhewing her the houſe, brought into the chapel, and, being there much in fear (as ſhe pretended and gave in evidence (*a*)), was married to the ſaid *Roger Fulwood*, in the preſence of the ſaid *Lady Fulwood* his mother, and of the ſaid *Richard Bowen* and divers others.

The defendant *Roger Fulwood* brought divers witneſſes to prove ſhe was willing to marry him; and that ſhe being aſked the queſtion before by him, Whether ſhe were willing to marry him? anſwered, That ſhe was willing, and appointed a taylor to make her a gown, and was found in bed with him; but ſhe pretended it was by reaſon of his threats, and when ſhe was in ſuch fear as ſhe knew not what ſhe did (*b*).

The defendant, on an indictment for forcibly taking a woman in one county and marrying her in another, may be found guilty in either county.

Hob. 183.

1. Hawk. P. C. 172.

HOLBORN, who was aſſigned of counſel for the priſoners, hereupon moved, that foraſmuch as the force was in *Middleſex*, and no force is proved in *Surry*, the jury ought not to find them guilty in *Surry*.—But ALL THE COURT, *abſente* BERKLEY, delivered their opinions *ſeriatim*, that if the jury found that ſhe was taken with force in *Middleſex*, and carried in a coach unto *Strand-bridge*, and brought by them into *Surry*, it is a continuing force, and a forcible caption in *Surry*, and an offence within the ſtatute.

Marriage by *dureſs* is a marriage within the

3. *Hen.* 7. c. 2.

1. Sid. 65.

1. Roll. Ab. 340.

Dyer, 13. *in marg.*

HOLBORN, *Counſel*, then alledged, that it was not a marriage; for ſhe affirmed upon her oath in her examination, and now *viva voce*, that ſhe knew not what ſhe did.—But ALL THE COURT held, although this might avoid the marriage, that it is ſuch a marriage as is an offence within the ſtatute.

3. Com. Dig. 549. 2. Bac. Ab. 159.

(*a*) 1. Hale, 661. 4. St. Tr. 455. 3. Bac. Ab. 577, 578. 2. Hawk. P. C. 606. 4. Bl. Com. 209. 3. Keb. 193. 1. Vent. 843. 1. Burr. 424. 8 R. H. 82. 266. (*b*) Roll. Ab. 340. Co. Lit. 33. 6. Co. 22. Keilw. 52. Dyer, 13. Sid. 65.

But

But for *Lady Fulwood*, becauſe it appears not ſhe was party to the forcible taking, or conſenting thereto, it was not an offence in her within the ſtatute: the jury therefore found *Roger Fulwood* and *Bowen* guilty, and *Lady Fulwood* not guilty.

In "ſtealing an "heireſs," privies to the marriage are not within the act, unleſs they are alſo parties to the force.

HOLBORN, being aſſigned of counſel as aforeſaid for matters in law ariſing upon the evidence, or otherwiſe, after verdict, moved in arreſt of judgment, that the indictment was not good; FIRST, Becauſe it is not expreſſed in the indictment that the taking was *eâ intentione*, that the ſaid *Roger Fulwood* would marry or defile the ſaid *Sarah*; which is the exception in 31. *Hen.* 8. c. . for which that indictment was diſcharged.

An indictment on 3. *Hen.* 7. c. 2 need not alledge that the taking was with intention to marry or defile. *Ante*, 485. 1. Hawk. P. C. 172.

SECONDLY, That whereas divers were indicted, the indictment was *cepit*, whereas it ought to have been *ceperunt*.

But ALL THE COURT, *abſente* BERKLEY, reſolved, that this was not any cauſe of exception; for in regard it appears apparently by the indictment that they took her, *et abduxerunt* (*a*) for lucre, and the ſame day married her the ſaid *Sarah*, that ſhews the caption to be with an intent to marry her; alſo there are no ſuch words in the ſtatute *eâ intentione*, the offence being by reaſon of the caption againſt her will.

Falſe Latin will not vitiate an indictment.

(*a*) The roll is, "*ceperunt et abduxerunt.*" See 2. Hawk. P. C. 338. 2, Ld. Ray. 1198.

And *I* delivered my opinion to be, that if one takes ſuch a ward forcibly and againſt her will with an intention to marry her, it is felony, although marriage or defiling doth not follow thereupon. But JONES ſaid, that it hath been reſolved, and was ſo reported by *Daliſon* (*b*), that forcible taking away againſt her will, if marriage or defilement did not enſue, was no felony. BRAMPSTON doubted thereof.

Qu. If an indictment will lie on 3. *Hen.* 7. c. 2. for forcibly taking an heireſs, unleſs either marriage or defiling enſues.

3. Inſt. 61. 3. Keb. 193. 2. Vent. 243. 1. Hawk. P. C. 173.

(*b*) Daliſon, 22.

Wilner *againſt* Hold.

CASE 14.

ACTION FOR THESE WORDS: "Thou art a rogue and "a raſcal, and haſt killed thy wife," *quandam Elizabetham nuper uxorem le plaintiff innuendo.* After not guilty pleaded, and found for the plaintiff, and damages twenty marks,

Rogue and *raſcal* are words of heat, but not of ſcandal.

ATKINS and TREVOR moved in arreſt of judgment, that no action lies for theſe words; for the words of "rogue" and "raſcal" are but words of heat, for which no action lies: and thereto the whole Court agreed.

SECONDLY, It lies not for the words, "Thou haſt killed thy "wife," becauſe it is not ſhewn that his wife is dead, nor how ſhe was killed, nor that ſhe was violently killed or murdered: and although the declaration is *nuper* his wife, yet that doth not prove that his wife was dead; for it may be they were divorced.

An action lies for publiſhing words importing a charge of murder; and it ſhall be intended, without averment, that the party was dead,

Sed non allocatur; for when it is ſaid *nuper* his wife, it ſhall be intended ſhe is dead, and not have ſuch foreign conſtruction that ſhe was divorced. And THE COURT further held, that the words, "Thou haſt killed thy wife," ſhall be intended according to the uſual ſpeaking, that he killed her voluntarily; and whatſoever way he killed her, the words are very ſcandalous. Wherefore it was adjudged, that the action lies.

Yelv. 21. 1. Sid. 53. 4. Co. 16. a. Cro. Eliz. 317. 569. 823. Cowp. 276.

1. Roll. Abr. 77. 1. Vent. 117. 149. 2. Bl. Rep. 969, and ſee the caſe of Peake v. Oldham,

Case 15.

Kniveton *againſt* Latham.

Payment, *after forfeiture*, of the principal, intereſt, and coſts, due upon a bond to an infant of eighteen years of age, who was one of three executors of the obligee, cannot be pleaded in ſatisfaction to an action of debt, by all the executors for the penalty. *Sed quære. Vide* 4. & 5. *Ann.* c. 16.

Jones, 400. 1. Roll. Ab. 730. Moor. 852. Co. Lit. 172. a. Cro. Eliz. 719. Vent. 354. 3. Lev. 368. 2. Stra. 1028. 2. Bar. K. B. 183. 1. Com. Dig. 249. 2. Bac. Ab. 378. 2. Term Rep. 388.

DEBT by *Daniel Kniveton*, *Francis Kniveton*, and *William Kniveton*, executors of *John Kniveton*, upon an obligation made to their teſtator of one hundred pounds the 9. *Car.* 1. upon condition to pay fifty-two pounds.

The defendant demands *oyer* of the condition; which being entered, he pleads, That he paid the fifty-two pounds to *Francis Kniveton*, one of the executors, in ſatisfaction of the ſaid debt, and all intereſts and damages for it; and thereupon the ſaid *Francis* releaſed to him the ſaid obligation.

The plaintiff replies, That the ſaid *Francis Kniveton* was within age at the time of the releaſe, *viz.* of the age of eighteen years.

The defendant upon this demurred.

Alestre, *for the defendant*, now ſhewed the cauſe of demurrer to be, Becauſe he doth not deny the payment of the principal, intereſt, and damages: and although the bond was forfeited *rigore juris*, yet acceptance is good cauſe of his making the releaſe, and he is not to take advantage of the forfeiture of the bond; and although he be an infant, yet being above the age of ſeventeen years, who may take upon him to be executor, his releaſe as executor is good, and ſhall bind him and his co-executors.

Rolle, *for the plaintiff*, argued, that this releaſe, being by an infant, is void; for the bond being forfeited, the entire hundred pounds is due, and acceptance of part of a ſum, *viz.* fifty-two pounds, cannot be taken as ſatisfaction; and this releaſe ſhall not prejudice him, being an infant, for he hath loſs thereby, and is in danger of a *devaſtavit*.

Jones and Berkley, *Juſtices*, were of opinion, that a releaſe by an infant, although he be executor, without receipt of the entire debt, is not good, nor ſhall bind him; for although it is againſt conſcience that he ſhould take the forfeiture of the bond, yet he may if he will.

Berkley, *Juſtice*, held, that this giving a diſcharge of the entire bond ſhall be a *devaſtavit*, by which the infant being to receive prejudice, that deed ſhall not bind him.

But *I* held, that foraſmuch as he did it only as executor, and according to good conſcience, and none denies but that there was payment made of the principal debt, there is good cauſe this releaſe ſhould bind him; and that it ſhould not be a *devaſtavit*, becauſe he did that which he was compellable to do in a court of conſcience. 5. *Co.* 27. *b. Ruſſel's Caſe.* 16. *Hen.* 6. "*Releaſe*," 45. 21. *Edw.* 4. *pl.* 29.

And afterwards, this Term, being again moved by Rolle, *for the plaintiff*, Brampston, *Juſtice*, agreed with Jones and Berkley, that this releaſe by an infant ſhall not bar, becauſe the infant being executor, by courſe of law is to have the benefit of the forfeiture of the bond, and the entire ſum in the bond is a debt due to the executor; and when the infant, being but one of the executors, takes part of the money only (although it be all which was due in conſcience), yet this releaſe ſhall not bar him; but

but if he will take all the money, and make a releaſe, then it is good; and if the defendant would have remedy, he is to have it in a court of equity (*a*), and cannot plead this releaſe in bar at the common law. Whereupon rule was given, that judgment ſhould be entered for the plaintiff, unleſs other cauſe were ſhewn upon the *Thurſday* following.

KNIVETON *againſt* LATHAM.

(*a*) Show. Caſ. Par. 15. Eq. Caſ. Ab. 91. 288. Salk. 154. 1. Vern. 342. 350. 2. Vern. 509. 299.

This caſe was afterwards moved at the table in *Serjeant's Inn, Fleet-ſtreet.*

DAMPORT, *Chief Baron*, and DENHAM, *Baron*, agreed, that this releaſe, without payment of the entire ſum contained in the bond, it being forfeited, was not any bar to the infant.

But BRAMPSTON, *Chief Juſtice*, and DAMPORT, *Chief Baron*, agreed, that ſuch releaſe by an executor of full age, upon receipt of the principal money and the intereſt, ſhall be only *aſſets* for the intereſt and money received, and ſhall not be a *devaſtavit* for the reſidue, becauſe he did that which in good conſcience he ought to do (*b*).

(*b*) Off. Ex. 228. 1. Saund. 307. 2. Lev. 189. 3. Peere Wms. 381. 1. Com. Dig. 255.

(*a*) But now, by 4. and 5. Ann. c. 16. payment of principal, intereſt, and coſts, at any time before the action brought, may he pleaded in bar; or after action brought (and bail put in, 6. Mod. 11.) they may be paid into court and proceedings ſtayed.

The King *againſt* Rooks.

CASE 16.

SCIRE FACIAS being ſued in chancery againſt *Thomas Rooks*, to ſhew cauſe wherefore his patent of the office of Searcher of the port of *Sandwich, cum membris*, granted to him for life, ſhould not be ſeiſed as forfeited, becauſe by inquiſition upon a commiſſion iſſued out of the chancery it was found, that divers miſdemeanors were committed by him, to the great prejudice of the king, and forfeiture of his office; upon this the defendant appeared there, and traverſed the points found in the inquiſition; and thereupon twenty-ſix iſſues were joined upon ſo many ſeveral points found in the office, ſome of them being triable in *Kent*, others by a jury of *Middleſex*. Upon this, the record being delivered by the lord-keeper with his own hands, evidence was given at the bar to a *Kentiſh* jury upon ſeventeen of theſe iſſues.

A *ſcire facias* to repeal the patent of a ſearcher of a port for non-attendance.

Cro. Jac. 559.

One of them was merely for his abſence from executing his office from the tenth of *June*, 10. *Car.* 1. to the twelfth of *Auguſt* following. To this the defendant pleaded, that he was ſick all the ſaid time; and iſſue being joined thereupon, he failed in proof thereof. The proof on the part of the plaintiff was, that he was well in health at *London* at that time: this iſſue was found for the plaintiff.

The voluntary abſence of a port ſearcher from his duty is a forfeiture of office.

39. *Hen.* 6. 33. b. 2. Bulſt. 58. 3. Mod. 146.

Palmer, 89. Dyer, 238.

And to three other ſeveral times of his abſence found in the inquiſition, he pleaded that he was in priſon, and in execution at the king's ſuit, by command out of the exchequer: and upon theſe three iſſues, becauſe ſome doubt was conceived, foraſmuch as the impriſonment was at the king's ſuit, whether that ſhould

Qu. If the abſence of a king's officer, occaſioned by impriſonment at the ſuit of the king for a miſdemeanor in his offices, is a cauſe of forfeiture?—Co. Lit. 233. 2. Roll. Ab. 153. 3. Mod. 233. 1. Hawk. P. C. 311.

THE KING *againſt* ROOKS.

not excuſe him for his abſence in regard of the neceſſity, he being committed for debt to the king and miſdemeanor in his office; to avoid therefore the queſtion (there being many other cauſes of forfeiture of his office), it was conceived the king ſhould not give evidence for them.

If a port ſearcher be abſent, and, by not appointing a deputy, goods and merchandize are exported without being ſearched, it ſhall be conſidered voluntary, and a forfeiture of his office.

9. Co. 50. 2. Lev. 71. 3. Lev. 288. Dyer, 151. 238. 2. Bulſt. 58. 3. Mod. 140.

Two other ſeveral iſſues were, Whether he voluntarily ſuffered a ſhip laden with ſeveral commodities (naming them) to be exported, and other ſhips to be imported and unladen, without being ſearched? And upon the evidence it appeared, that ſuch a ſhip was imported and unladen, and others alſo were exported beyond ſeas, not being ſearched; but theſe were ſo imported and exported when neither himſelf or any of his deputies were there; ſo it appears not whether it was by negligence or voluntarily, for he did not know of them, and ſo not within that iſſue.—But ALL THE COURT held, that this voluntary abſence and neglect, ſo as neither himſelf nor ſervants were there to ſearch, is not only *craſſa negligentia*, but a voluntary permiſſion; as if a gaoler ſhould leave his priſon doors unlocked, and the priſoners eſcape, it is not only a negligent, but a voluntary eſcape: ſo here, &c.—Whereupon the jury found this iſſue againſt the defendant.

If an officer of the cuſtoms ſeize uncuſtomed goods, and, inſtead of taking them to the king's warehouſe, convert them to his own uſe, it is a forfeiture of office.

3. Bac. Ab. 742.

Another cauſe of forfeiture of the ſaid office was in iſſue, *viz.* that he ſeized divers goods forfeited for not being cuſtomed, and accounted not for them to the king, but converted them to his proper uſe. To this he pleaded, that he ſeized them, and was ready to account, and traverſeth the converſion; and upon the evidence it appeared, that he ſeized them as forfeited, and never tendered to account, nor brought them into the exchequer, nor ſignified in the exchequer what they were (as he ought to have done), but he himſelf ſold them at *London*, which was a clear converſion.—Whereupon this iſſue was alſo found againſt him.

CASE 17.

Herbert *againſt* Laughluyn.

Eaſter Term, 12. *Car.* 1. *Roll* 388.

An ejectment will not lie de piſcariâ in a river, nor for common apprendre, or rent, or other incorporeal hereditament. Ante, 362.

Cro. Lit. 9. a. Co. Lit. 5. Cro. Jac. 146. 3. Bl. Com. 206.

ERROR of a judgment in the king's bench in *Ireland* (*a*), in an ejectment. The principal error inſiſted upon was, That this ejectment is brought *de piſcariâ* in ſuch a river.—And becauſe it was not *terra aqua cooperta*, nor of any land, but only of a profit *apprendre*, ALL THE COURT, *abſente* BRAMPSTON, *Chief Juſtice*, held, that an ejectment lies not thereof, no more than of common *apprendre* or rent; wherefore for this error the judgment was reverſed. But JONES ſaid, that peradventure an aſſiſe would lie of ſuch a piſcary, becauſe it is *proficuum in certâ loco capiend.*; but he cannot maintain an ejectment.

8. Mod. 277. Yelv. 143. 1. Brownl. 142. 129. 2. Lev. 114. Sid. 161. Stra. 54. Dougl. 466. 1. Term Rep. 11.

(*a*) But this dependency is repealed by 32. Geo. 3. c. 53.

Fulwood

Fulwood and Bowen's Caſe.

Caſe 28.

Vide Ante, P. 482. 484. 488.

ROGER FULWOOD and RICHARD BOWEN, having been found guilty on 3. *Hen.* 7. c. 2. being brought to the bar, and demanded what they could ſay why judgment ſhould not be given againſt them, anſwered, that they had not any more to ſay. And THE COURT, being full, reſolved that judgment ſhould be given.

The 3. *Hen.* 7. c. 2. againſt forcible marriage, is an exiſting law; and by 39. *Eliz.* c. 9. the offence is made *felony* without clergy.

JONES, *Juſtice*, pronounced it, and ſaid, that although it had been objected, and was divulged, that it was an obſolete ſtatute, and it would be hard if any ſhould be condemned thereupon; he thereto anſwered, that they were deceived, for it is a good ſtatute and in uſe, but many had not been executed thereupon, becauſe they had their clergy, for the taking whereof away the ſtatute of 39. *Eliz.* c. 9. was made, and ſome have been ſince hanged; and within theſe ten years one *Thorold* was indicted and arraigned at *Newgate* upon this ſtatute, for the taking of *Mrs. Havers*, an orphan, againſt her will, and marrying her; but he obtained his pardon, and avoided the conviction by this means.

3. Keb. 198. 2. Vent. 243. 1. Hawk. P. C. 171. 3. Inſt. 62. 1. Vent. 243. Kely. 81. and the Caſe of H. Swendzen, for forcibly marrying *Mrs. Rowlins*, 4. St. Tr. 450.

And whereas it is here pretended, that *Sarah* was married with her conſent, and therefore not within the ſtatute, he ſaid, and we all conſented thereto, that the taking being unlawful and againſt her will, although the marriage was with her will, yet it is felony within the ſtatute.

Forcibly taking a woman, although the ſubſequent marriage be with her own conſent, is felony.—1. Hawk. P. C. 172.

And they all held, although this was not a marriage *de jure*, becauſe ſhe was in ſuch fear (as ſhe affirmed upon her oath) that ſhe knew not what ſhe anſwered or did, yet it is a marriage *de facto*, and is felony within the ſtatute. Wherefore judgment was given, that they ſhould be hanged.

A marriage *de facto* is a marriage within 3. *Hen.* 7. c. 2.

Hilary

Hilary Term,

13. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

Kellend *againſt* Whyte.

Trinity Term, 13. *Car.* 1. *Roll* 1626.

In ejectment, if the defendant plead a prior title by deviſe and deſcent, and that he was ſeiſed of the land until the plaintiff diſſeiſed him, A REPLICATION confeſſing the ſeiſin, but pleading a fine in bar without anſwering the diſſeiſin, is bad. *Ante*, 324. Jones, 402. R. 395. 2. Cr. 44.

EJECTMENT of a leaſe made by *John Arundel* to the plaintiff. The defendant pleaded, that long time before the leſſor had any thing to do, *J. Whyte*, grandfather of the defendant, was ſeiſed in fee of that land holden in ſoccage, and deviſed it to *T. Whyte*, his ſon, the defendant's father, in tail; who entered, and died ſeiſed; which deſcended to the defendant; whereupon he entered, and was ſeiſed in tail, until the ſaid *John Arundel* entered upon him and diſſeiſed him, and let to the plaintiff. The plaintiff confeſſeth the ſeiſin of *J. Whyte*, and the deviſe in tail; but pleads a fine with proclamation to bar this entail, and conveys title to the leſſor of the plaintiff. And upon this plea the defendant demurred.

MAYNARD ſhewed the cauſe to be, Becauſe the diſſeiſin is the material part of the bar, and the entail is but an inducement thereto; and therefore he ought to confeſs and avoid the diſſeiſin alledged, or traverſe it.

ROLLE, *for the plaintiff*, maintained the replication, Becauſe it conveys a ſpecial eſtate to the defendant, and a deſcent thereby, and it ſufficeth to avoid that entail alledged. And in proof thereof he relied upon *Heliar's Caſe*, 6. *Co.* 24.

But ALL THE COURT, *abſente* BRAMPSTON, held, that this replication is vitious; for it is but argumentative, and is no expreſs confeſſion and avoidance, and it ought to anſwer the material part of the bar, which is the diſſeiſin, and he ought not to anſwer unto it by argument. And it is not like *Heliar's Caſe*; for there both claimed the ſame term, which cannot be gained by any, unleſs by grant; and there entitling himſelf by a former grant from the ſame perſon by whom the defendant claims, it is a good confeſſion and avoidance of the laſt aſſignment. Whereupon it was here adjudged for the defendant.

CASE 2.

Perry *againſt* Diggs.

Trinity Term, 13. *Car.* 1. *Roll* 402.

Judgment in trover againſt huſband and wife reverſed, becauſe the converſion was ſtated to be *ad uſum ipſorum*. Ante, 254.—1. Roll. Ab. 6. Cro. Jac. 5. Carth. 251. See the Caſe of Smally v. Kerfoot, Andr. 242. 1. Com. Dig. 220.

ERROR of a judgment given at *Marlborough*, where the plaintiff declared in an action of *trover* againſt huſband and wife, that they converted *ad uſum ipſorum*; and after verdict, upon not guilty pleaded, judgment was given for the plaintiff.

The

The error here assigned was, That the declaration was not good, because a *feme covert* with her husband cannot convert to the use of the wife, but all is done to the use of the husband. Peake *against* Digges.

For this cause therefore it was reversed.

Reeve *against* Digby.

Case 3.

Trinity Term, 13. *Car.* 1. *Roll* 303.

ERROR of a judgment in the common pleas in an action upon the case, for the disturbance of using his common in a certain place called "THE LAKES;" and shews the prescription of common, and the disturbance by digging forty thousand turfs, and making of a fish-pond.

In an action for disturbance of common by digging turf and making a fish-pond, on issue whether sufficient common remained, a verdict finding disturbance as to *the turfs*, and no disturbance as to *the fish-pond*, is not repugnant; for it is in different respects.

2. Roll. Abr. 695. 702. 717. Hob. 73. 262. 1. Ander. 42. 3. Mod. 72. Latch. 93. Hardres, 330. 2. Lev. 140. Dougl. 377.

The defendant pleaded, that he was lord of the manor, and improved the said several parcels according to the statute, leaving sufficient common in the residue.

Issue being thereupon, the jury found as to the parcel where the digging of the forty thousand turfs was, that the defendant *had not left* to the plaintiff sufficient common, and assessed damages five shillings and costs; and as to the digging of the fish-pond, that the defendant *had left to* him sufficient common. And upon this verdict judgment was given for the plaintiff for the first, which is directly found against the defendant; and for the other part, for digging of the fish-pond, judgment was for the defendant, and the plaintiff *in misericordiâ*.

The error hereupon assigned was, That this verdict was repugnant, to find that he had not sufficiency of common, and that he had sufficiency of common: wherefore the first finding for the plaintiff is good; and the finding of the second, which is repugnant, is void. And the judgment, being for the defendant for part, is erroneous.

And of that opinion was BERKLEY, because it is one entire issue. But *I* held, that the verdict is good enough, for it is *in diversis respectibus*; and it may be he had sufficient common notwithstanding the fish-pond, and had not sufficient in respect of digging the turfs; so the damages to the plaintiff is only by reason of the digging of turf. And JONES doubted thereof. *Per quod adjournatur.*

Hughes *against* Bennet,

Case 4.

Trinity Term, 13. *Car.* 1. *Roll* 1536.

COVENANT. Upon demurrer the case was, *Edward Bennet* covenants, in consideration of a marriage of his son *John Bennet* with *Elizabeth* the daughter of *Hughes*, and such a portion to be paid, to stand seised of such lands to the use of the wife for life, and to the use of the son in tail; and covenants in the said indenture in form following, *viz.* "THAT he was seised in fee of those lands "of a lawful estate in fee, notwithstanding any act done by him, "&c.;" and that "the said lands were of the annual value of 200l. "*per annum, ultra repriſas.*" The defendant pleaded, that they were

Covenant.

Jones, 403. 2. Ro. 249.

of

Hughes against Bennett.

of the value of two hundred pounds a-year, notwithstanding any act done by him. And hereupon the plaintiff demurred.

It was argued by LANE, *for the plaintiff*, and by ROLLE, *for the defendant*. And, after argument at the bar,

Ante, 107.

ALL THE COURT resolved, that these words, "notwithstanding "any act, &c." do not refer to the second covenant, but only to the first part; but the value is properly in the conusance of the covenantor; and it was his ingent that she should have a jointure of the annual value of two hundred pounds absolutely: and it is not proper to say, that for any thing by him, &c. it should be of such a value; but absolutely that it should be of such a value. Whereupon it was adjudged for the plaintiff.

R. 3a.

Easter

14. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Hall *againſt* Marſhall.

CASE 1.

Michaelmas Term, 13. *Car.* 1. *Roll* 41.

On a promiſe to permit the plaintiff quietly to carry away a quantity of furzes *within a certain time*, the omiſſion of alledging that he diſturbed him *within the time* is aided by the verdict.

Ante, 209. 420.

2. Jones, 40. 145. 232. Raym. 487. 2. Roll. Rep. 66. Carth. 7. 130. 1. Mod. 169. 3. Mod. 162. Strange, 212. Cowp. 825. Dougl. 658. 682, 683. 1. Term Rep. 145. 545.

ERROR of a judgment in the common pleas in *aſſumpſit*. Whereas the defendant, in conſideration of one hundred and thirty pounds paid and ſecured to be paid, bargained and ſold to him, 7th *March* 9. *Car.* 1. 1634, all the furzes growing upon ſuch a parcel of land, to be taken before *Michaelmas* 1635; that the defendant, in conſideration, &c. aſſumed to the plaintiff, that he ſhould peaceably permit him to enjoy the ſaid furze, and quietly to carry them away without diſturbance: and although the defendant had permitted him to carry away fifty loads of the ſaid furze, yet he did not permit him to enjoy all according to his promiſe, but diſturbed him from taking one thouſand loads of them which were growing upon the land at the time of the bargain. Upon *non aſſumpſit* pleaded, and found for the plaintiff, and judgment given in the common pleas,

The error aſſigned was, Becauſe he doth not ſhew the certain time of diſturbance, whether it were before *Michaelmas* 1635, otherwiſe there is no cauſe of action.

But ALL THE COURT reſolved, that this is no cauſe of error; for, being after verdict, it is intended that it was within the time, the defendant having pleaded *non aſſumpſit*, and the cauſe of the damage appearing upon the trial, otherwiſe there had been no cauſe to have damages: and it is not material that the time of the diſturbance ſhould be alledged in the declaration; for it is collateral to the promiſe. Wherefore the judgment was affirmed.

James *againſt* Tutney.

CASE 2.

Hilary Term, 11. *Car.* 1. *Roll* 753.

A cuſtom in a manor to make bye-laws for the regulation of a common or great waſte parcel of the manor, is good.

ERROR of a judgment in *replevin* in the common pleas; where the defendant made conuſance as bailiff to *Sir John Stowell*, For that the ſaid *Sir John Stowell* was ſeiſed in fee of the manor of *Somerſon*, whereof a great waſte called *Kinſmore* is, and from time whereof, &c. was parcel; and that the ſaid *Sir John Stowell*, and all thoſe whoſe eſtate, &c. have had, time whereof, &c. in the ſaid moor a court

JAMES *againſt* TUTNEY.

court to be holden twice every year by the ſteward of the manor; in which court, upon reaſonable ſummons, all the commoners within the ſaid common have uſed to appear, or to be amerced: and that within the manor is ſuch a cuſtom, that the ſteward ſhould out of the commoners chuſe a jury to enquire of all purpreſtures and misfeaſances within the ſaid common; and that the ſaid jury had uſed to make ordinances concerning the well-uſing the common; and that all thoſe who had common had uſed to be obedient to the performance of thoſe ordinances, under a reaſonable pain to be ſet down by the jury; for which pains forfeited the lord of the manor hath uſed, time whereof, &c. to diſtrain: and alledges in fact, that at ſuch a court a bye-law was made by ſuch, being jurors, whereby it was ordered, "That no commoner ſhould keep any "ſheep in the bounds below the meer, under the pain of three "ſhillings four pence:" and for keeping ſheep againſt the ſaid ordinance, and the penalty forfeited, the diſtreſs was taken.

3. C. Jones, 421. 1. Roll. Ab. 365. 2. Roll. Ab. 136. Co. Lit. 116. Hob. 212. Moor, 75. 579. 584. Dyer, 322. Carter, 179. Palmer, 396. 5. Co. 63. Savil, 74. 3. Lev. 49. 1. Burr. 127.

Upon this conuſance the plaintiff demurred: and judgment being given for the avowant, error was brought.

A bye-law that no commoner ſhall put his ſheep into a particular part of the common is good.

BEAR now aſſigned for error, FIRST, That this was not a good bye-law to bind one for his inheritance.—But ALL THE COURT held, that an ordinance by cuſtom for the government of the common is good; and this is not to take away the inheritance, but for regulating the common. *Vide* 15. *Eliz. Dyer*, 314. 5. *Co.* 62. 21. *Hen.* 7. *pl.* 40.

1. Roll. Ab. 365. 1. Com. Dig. 610.

In an action for a penalty under a bye-law, notice of the bye-law need not be alledged.

SECONDLY, Becauſe he doth not ſhew that the plaintiff had notice of this ordinance.—But it being proclaimed in court, as it was alledged in the plea, he, being a commoner, is bound to take notice thereof; for none elſe is bound to give him notice.

Carth. 481. 1. Roll. Abr. 365. 468. 5. Com. Dig. 54. Cowp. 62.

Ld. Raym. 788.

THIRDLY, Becauſe coſts are given in this caſe to the defendant; and it was ſaid, that it is out of the ſtatutes of 7. *Hen.* 8. c. 4. and 21. *Hen.* 8. c. 9. being a diſtreſs for a penalty.—And of that point THE COURT would adviſe (*a*).

(*a*) See this *point* moved again, and argued by the Judges, poſt. 533.

Case 3.

The King *againſt* Heyward and two Others, his Sureties.

A recognizance for good behaviour is not forfeited by raſh, quarrelſome, or unmannerly words, unleſs they directly tend to a breach of the peace, to terrify others, or to promote ſedition.

SCIRE FACIAS upon a recognizance of the good behaviour. The breach was aſſigned, FIRST, Becauſe *Heyward* ſaid to a conſtable, in executing his office, "Thou art a lying raſcal." SECONDLY, Becauſe he ſaid to another who threw down his hedges, "One of you is dead of the plague, and I hope I ſhall ſee more "of you to die of the plague." THIRDLY, Becauſe he ſaid to a woman, that "ſhe was an whore and jade," and other foul words concerning her incontinency. FOURTHLY, Becauſe he ſaid to one in the church-yard, after evening-prayer, that "he "was a forſworn knave," and "a perjured knave." The defendant pleaded not guilty. And upon evidence at the bar, it appeared by one witneſs that he ſpake to the conſtable, becauſe

Dalt. 284. Cro. Eliz 86. Moor, 249. 2. Roll. 227. 299. Palmer, 126. Stiles, 369. Cro. Jac. 412. 498. 4. Bac. Ab. 697, 698.

to

he affirmed that the defendant uſed to carry picklocks about him, "Thou art a lying raſcal." And the other witneſſes on the behalf of the king did not prove that theſe words were in diſturbance of the execution of his office, or for any act about the executing of his office. And for all the other words, they were words of heat and intemperance; but none of them tended to the *breach of peace*, or to the terror of any; nor was there any act done, but only evil words, and of thoſe words the perſons againſt whom he ſpake them gave the occaſion. And although the manner of ſpeaking may be good cauſe in diſcretion to bind one to his good behaviour, yet one being bound, words only which tend not to the breach of peace, or terrifying others, or unto ſedition, &c. ſhall not be ſufficient cauſe of forfeiture of a recognizance, for then by ſuch pretence of words a man ſhould be in danger of his recognizance, which would be inconvenient. Wherefore it was left to the jury to conſider of the verity and validity of the evidence, and of the manner of ſpeaking them; whereupon they, being a ſubſtantial jury, conſidering thereof, gave their verdict for the defendant, that he was not guilty. *Vide* 2. *Hen.* 7. *pl.* 2. 22. *Edw.* 4. *pl.* 35. 18. *Edw.* 4. *pl.* 28.

THE KING *againſt* HEYWARD, &c.

Tremain, P. C. 613. 1. Hawk. P. C. 258. 262. 4. Inſt. 180.

The King and the Informer *againſt* Fredland.

CASE 4.

ERROR of a judgment in *London* upon an information upon the ſtatute of 5. *Eliz.* c. 4. ſ. 31. for uſing a trade wherein he was not brought up as an apprentice for ſeven years, *viz.* for uſing the trade of *a hemp-dreſſer*. And for this the error was aſſigned.—And ALL THE COURT held, that this is no ſuch trade as is within that ſtatute; for it is not a trade requiring much learning or ſkill, and every huſbandman doth uſe it for his neceſſary occaſions, and it is not within the words or intent of the ſtatute. And JONES ſaid, he much doubted of the uſing the trade of baking and brewing. But it was thereto anſwered (to which he agreed) that it extends only to common brewers and common bakers, and not to any who brew or bake in their private houſes. Whereupon rule was given (*abſente* BRAMPSTON), that judgment ſhould be reverſed, unleſs cauſe, &c.—NOTE, this was without argument, being conceived to be a clear caſe.

A hemp-dreſſer is not a trade within the 5. *Eliz.* c. 4. ſ. 31.

8. Co. 130. a. 11. Co. 54. 2. Bulſt. 191. Vent. 326. Moor, 886. Hob. 183. Cro. Jac. 178. Carth. 163. Salk. 611. Ld. Ray. 514. 12. Mod. 311. 3. Bac. Ab. 552. 5. Com. Dig. 572, 573.

Anonymous.

CASE 5.

ACTION UPON THE CASE, for diverting of an ancient water-courſe, *qui currere conſueviſſet et debuiſſet* to his mill. After not guilty pleaded, and found for the plaintiff,

In an action for diverting an *ancient* water-courſe, it is not neceſſary to ſhew a title by preſcription or otherwiſe.

It was moved by ROLLE, in arreſt of judgment, That the declaration was not good, becauſe he doth not ſhew any title to the water-courſe by preſcription or otherwiſe.

But GRIMSTON, *for the plaintiff*, argued, that the declaration was well enough; for being alledged, that it is *antiquus aquæductus*, and that by it the water *currere conſueviſſet et debuiſſet*, it compriſeth in itſelf ſufficient title, eſpecially againſt a ſtranger who diverted it.

Lut. 123. Cro. Jac. 43. 123. 605. 2. Vent. 292. Owen, 109. Dougl. 683.

4. Mod. 175. 423. Carth. 85. Skin. 316.

And

Absentious.

Poſt. 375.
4. Co. 84. b.
Show. 64.
10. Co. 59. b.
Hob. 44.
3. Mod. 49.
3. Lev. 133.
2. Burr. 440.

And ALL THE COURT being of that opinion, it was adjudged for the plaintiff.

Afterwards, the ſame day, another action upon the caſe for diverting an ancient water-courſe, *qui ad terram* le plaintiff's *currere conſueviſſet et debuiſſet*, to water his land, and for his cattle to drink. After verdict for the plaintiff, SERJEANT HENDEN took the ſame exceptions, and the ſame rule was given againſt him.

Trinity

Trinity Term,

14 Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

Neviſon *againſt* Whitley.

CASE 1.

DEBT upon an obligation of one hundred pounds, dated 12. *July*, 10. *Car.* 1. with condition for the payment of 58l. at the end of ſix months.—The defendant pleaded the ſtatute of 21. *Jac.* 1. c. . of Uſury (*a*), which makes ſuch an obligation to be void, &c. The plaintiff replies, that he lent the fifty pounds for a year, and that the defendant ſhould pay eight pounds for the forbearance for a year, and that the plaintiff ſhould not demand it until the end of the year, and by the ſcrivener's miſtake it was made payable at the half-year's end, and he, not knowing thereof, accepted of the ſaid bond. The defendant rejoins, that the lending was only for half a year, and that he was to pay for it eight pounds for that time; and TRAVERSETH, that upon the ſaid twelfth of *July* it was agreed the loan ſhould be for one entire year, or that he ſhould forbear it for a whole year. And hereupon the plaintiff demurred. ROLLE, *for the plaintiff*, ſhews, that the bar was ill, becauſe it was not pleaded *quòd corruptè aggreatum fuit, &c.* for ſo is the courſe of pleading. The plea is, that he ſhould have for intereſt for forbearing, and he doth not ſay *corruptè, &c.*— And for this cauſe, THE COURT, *abſente* BRAMPSTON, held, that the bar was ill, and that the replication is well enough.

2 Sal. 648. 1. Hawk. P. C. 533.

Plea of uſury to debt on bond muſt ſtate that the agreement was *corrupt*. The plaintiff may reply "*ſcrivener's* "*miſtake*;" but if the rejoinder make *the day* parcel of the iſſue where *the agreement* only ought to have been traverſed, it is bad.

Jones, 396. 410. Clift. 185. 2. Vent. 83. Hard. 418. Cro. Jac. 508. 5. Com. Dig.

SECONDLY, It was objected, that this allegation is againſt the words of the condition.—But ALL THE COURT held, he might well make ſuch an allegation; for it is the ſhewing of the true agreement, that no intereſt was to be paid by the ſaid agreement but ſuch as ſtood with the law.

Cro. Jac. 678. B. R. H. 287.

THIRDLY, ROLLE excepted to the rejoinder, Becauſe he makes thereby the day to be parcel of the iſſue, which ought not to be, but he ought to have traverſed the agreement only, and therefore the rejoinder to the bar was ill.

Cro. Jac. 201.

THE WHOLE COURT was of this opinion; but no judgment, becauſe the plaintiff offered to accept his debt, and the defendant offered to pay it, &c.

(*a*) See now 12. Ann. c. 16. by which the legal intereſt is reduced to 5 per cent. *per ann.*

Lloyd *againſt* Gregory.

CASE 2.

EJECTMENT. Upon ſpecial verdict the caſe was, A leaſe for ninety-nine years being made by a dean and chapter 1. *Edw.* 6. void; but his ſurrender *in law* by the acceptance of a new leaſe is good, if ſuch new his term or decreaſe his rent.—3. C. Jones, 405. S. C. 1. Roll. Ab. 728. S. C. 2. Roll. Shep. Touch. 281. Co. Lit. 2. 8. Jones, 405. Moor, 105. Cro. Eliz. 220, Perk. 13. 2. Vent. 203. 3. Atk. 695. 1. Vez. 298. Ld. Ray. 315. 3. Com. Dig. 165. 5. Com. 1. BL Rep 578. 1. Term Rep. 441.

The ſurrender of an infant leſſee *by deed* is leaſe increaſe Ab. 24. 495. 3. Mod. 301. Dig. 513, 514.

LLOYD *againſt* GREGORY.

to begin AT the Feaſt of the *Annunciation* after the end of a leaſe of fifty years made 35. *Hen.* 8.; this leaſe being aſſigned to *John Shepheard* and *William Shepheard*, infants of eleven years of age, they, 29. *Eliz.* which was before the end of the term for fifty years, take a new leaſe of the ſame lands from the dean and chapter, for the ſame term, and for the ſame rent, and upon the ſame covenants; and after the end of the ſaid term for fifty years, the infants, being of full age, enter, and hold by that ſecond leaſe, and pay the rent accordingly to the dean and chapter, which they accept for divers years; and afterwards a new dean and the chapter cauſe an entry to be made, to avoid this leaſe, and let it to the defendant, who entered and *ouſted* them who were infants, and made a leaſe to the plaintiff, &c.

This was argued by WHITWICK *for the plaintiff*, and by MAYNARD *for the defendant*.

THE FIRST QUESTION was, Whether an infant may ſurrender a future intereſt by the taking a new leaſe? for if he had actually ſurrendered, it had been void, being but an intereſt of a term. —And for that point ALL THE COURT held, that a ſurrender by an infant cannot be by deed, but it is abſolutely void (*a*); and that a ſurrender by acceptance of the ſecond leaſe is void, becauſe it is without increaſe of his term or decreaſe of his rent; and where there is not an apparent benefit, or the ſemblance of a benefit, his acts are merely void; and here is no benefit or appearance of any to the infant, for he hath no manner of advantage thereby, but cauſe of quarrelling by this leaſe (*b*).

(*b*) See Zouch v. Abbot, 3. Burr. 1806. Lord Mansfield's Obſervations on the Report of this Caſe.

A leaſe AD *Feſtum*, &c. after the determination of a former leaſe, is as good as if it had been *a feſto*, &c. 3. Bac. Ab. 344. 5. Com. Dig. 513.

SECONDLY, Whereas it was objected, that it doth not appear that the infants had a leaſe for ninety-nine years; for it is miſrecited in the grant, *viz.* the grant mentions the leaſe for ninety-nine years to commence AD *Feſtum Annuntiationis* after the leaſe for fifty years be determined, and it ought to be A *Feſto Annuntiationis*;—THE COURT held it to be all one, for there ſhall be no fraction of a day, and it ſhall begin inſtantly from the determination of the former leaſe. And it is not like the caſe of *Miller v. Manwaring* (*c*). where there was a recital, that a leaſe was made 28. *Hen.* 8. for years, and that leaſe was granted, &c. whereas in truth it was dated 27. *Hen.* 8. for there is a whole year's difference, and no ſuch term. Wherefore it was adjudged for the plaintiff (*d*).

(*c*) Ante, 399.

(*a*) By 29. Geo. 2. c. 31. in all caſes where any perſon under the age of twenty-one years is intereſted in or entitled to any leaſe for life or years, he or his guardian may apply to any of the courts of equity by petition or motion in a ſummary way, and by deed may be enabled to ſurrender ſuch leaſe, and to accept a new leaſe of the premiſes compriſed in the leaſe ſo ſurrendered, &c. &c.

(*d*) See Ha'. MS. note 4. Co. Lit. 45. a. where it is ſaid to have been adjudged in this caſe, that a leaſe by *A.* dean of *B.* and his chapter, not warranted, is void immediately againſt *A.* himſelf, becauſe the corporation is aggregate.

CASE 3.

Arundel *againſt* Sanders.

Hilary Term, 13. *Car.* 1. *Roll* 1266.

Tender of marriage in *action on the caſe* "*in valore maritagii*," is not traverſable; but it muſt appear the anceſtor was ſeiſed in fee.

TRESPASS upon the Caſe brought by bill in the king's bench; ſuppoſing that the defendant's father held of him ſuch land by knight's ſervice, and died in his homage, his heir within age;

and

and that he tendered to him a convenient marriage, and ſhews what, &c. and demanded of him the value of the marriage, &c. The defendant, *protectando* to the tenure *pro placito*, traverſeth the tender, &c. And hereupon the plaintiff demurred.—And IT WAS RESOLVED that the plea was ill, for the tender is not traverſable. 150, 151.

ALUNDEL *againſt* SANDERS.

2. Bl. Com. 89. Cro. Jac. 66. 5. Co. 127. b.

But BEAR, *for the defendant*, moved, that the declaration is ill, Becauſe he declares in an action upon the caſe, where it ought to be *in valore maritagii*.—And THE COURT doubted of this point, becauſe there is a ſpecial original writ *de valore maritagii*. But JONES conceived, that action upon the caſe is maintainable. As an action upon the caſe lies for an eſcape as well as action of debt, ſo here it may be the one way or the other.

Ante, 142.

ANOTHER EXCEPTION was taken to the declaration, Becauſe it is not ſhewn that the anceſtor was ſeiſed in fee of the land ſuppoſed to be held, &c.—And that was conceived to be a material exception (*a*).—*Et adjournatur.*

(*a*) By 12. Car. 2. c. 24. the *valor maritagii* is taken away.

Middlemore *againſt* Goodale.

CASE 4.

COVENANT. Whereas the defendant by indenture enfeoffed *J. S.* of ſuch lands, and covenanted for himſelf and his heirs with the feoffee, his heirs, and aſſigns, to make further aſſurance upon requeſt; which lands *J. S.* conveyed to the plaintiff, who brings this action, becauſe the defendant did not levy a fine upon the plaintiff's requeſt;

If a man covenant with another, his heirs, and *aſſigns*, to make further aſſurance, it runs with the land, and the aſſignee ſhall have benefit of it.

The defendant pleaded releaſe from the ſaid *J. S.* with whom the firſt covenant was made, and it was dated after the commencement of this ſuit: and thereupon

The plaintiff demurred.

1. Roll. Ab. 521. 2. Com. Dig. 562. 3. Term Rep. 393.

And ALL THE COURT agreed, that the covenant goes with the land, and that the aſſignee at the common law, or at leaſtwiſe by the ſtatute, ſhall have the benefit thereof.

SECONDLY, They held, that although the breach was in the time of the aſſignee, yet if the releaſe had been by the covenantee (who is a party to the deed, and from whom the plaintiff derives) before any breach, or before the ſuit commenced, it had been a good bar to the aſſignee from bringing this writ of covenant. But the breach of the covenant being in the time of the aſſignee, for not levying a fine, and the action brought by him, and ſo attached in his perſon, the covenantee cannot releaſe this action wherein the aſſignee is intereſted. Whereupon rule was given, that judgment ſhould be entered for the plaintiff, unleſs cauſe was ſhewn to the contrary by ſuch a day (*a*).

In covenant by an aſſignee, the defendant may plead a releaſe from the covenantee for a breach in the time of the aſſignee, but not if the releaſe was given after the action brought.

Ante, 137.—1. Roll. Ab. 521. 2. Roll. Ab. 411. Cro. Jac. 511. 2. Lev. 206. 3. Lev. 154. Co. Lit. 215. Allen, 33. Dyer, 57. 3. Leon. 69. 2. Wilſ. 376. 5. Com. Dig. 235. 2. Ch. Caſ. 169.

(*a*) Judgment was given for the defendant. Poſt. 505.

Harriſon's Caſe.

CASE 5.

THOMAS HARRISON was indicted, For that on the 4. *May*, 14. *Car.* 1. while the courts of common pleas, king's bench, and chancery, were ſitting, he ruſhed to the bar of the common pleas, and in diſturbance of the Juſtices and of the court and ad-

To diſturb courts of juſtice by threatening or reproachful words to any

Judge ſitting therein, is a high miſpriſion, for which the offender may be indicted, fined, and impriſoned. Ante, 135.

exposed,

HARRISON'S CASE.

S. C. Hutton, 131. 1. Sid. 271. Cro. Car. 175. 503. Poph. 135. 1. Hawk. P. C. 88. 354. 4 Bl. Com. 126.

miniſtration of juſtice, and againſt the king and his regal majeſty, *palam et publicè et malitiosè* intending to draw JUSTICE HUTTON, one of the Juſtices of the common pleas, into diſpleaſure of the king and of other his ſubjects, and to bring him into danger of his life, and forfeiture of his life and goods, ſpake theſe words of him the ſaid JUSTICE HUTTON, in the preſence and audience of the Juſtices there ſitting: "*I accuſe* MR. JUSTICE HUTTON *of* "*high treaſon.*"

(a) 5. Co. 125. b. Fort. 101.

The defendant pleaded "*Not guilty*," and by a jury of knights and eſquires was found "*Guilty*," he confeſſing (*a*) that he ſpake thoſe words purpoſely and openly, becauſe JUDGE HUTTON, in his argument in the exchequer-chamber, maintained, that the king might not charge his ſubjects to find ſhips, and that therein he denied his ſupremacy; and by this means he ſtirred up the ſubjects to ſedition againſt the king.

The judgment was, that he ſhould pay a fine to the king of five thouſand pounds, be impriſoned during the king's pleaſure, have a paper upon his head ſhewing his offence, and go therewith to all the courts of *Weſtminſter*, and make his ſubmiſſion in every court in *Weſtminſter-Hall* and in the *Exchequer*, for it is an offence to every court (*b*).

(*b*) MR. JUSTICE HUTTON brought an action againſt him in the king's bench for defamation; and recovered 10,cool. damages.—Hut. Rep. 131.

KEELING, *Clerk of the Crown*, informed the Court, that impriſonment during the king's pleaſure is uſually entered, and not impriſonment during life, except where there is an awarding of forfeiture of lands during life.

CASE 6.

The Marquis of Wincheſter's Caſe.

Judgment of recuſancy may be reverſed for any defect in the record itſelf that tends to the king's prejudice, as the omiſſion of a *capiatur*, &c. notwithſtanding the words of 3. *Jac.* 1. c. 4. ſ. 16. Ante, 465.

8. Co. 59. a. Raym. 434. 11. Co. 59. 65. 2. Roll. 95. Cro. Jac. 211. 480. 492. Shower, 309. 3. Keb. 591. 5. Mod. 141. 2. Bac. Ab. 192. 1. Hawk. P. C. 25.

ERROR to reverſe a judgment for the king upon an indictment againſt him by the name of *Lord St. John*, for recuſancy, for his abſence from church for two months; whereupon he appearing, and pleading not guilty, it was found by verdict, that he was guilty for the abſence of one of the months, parcel of the time, and not guilty for the other month; wherefore it was adjudged, that he ſhould forfeit twenty pounds, and for the other month *eat inde ſine die*; and the King's Attorney ſignified his majeſty's pleaſure, that if it were erroneous, it ſhould be reverſed. And ROLLE aſſigned divers errors:

FIRST, That the indictment is *apud Caſtrum Winton.* and he doth not ſay in what county or pariſh *Winton* is.

SECONDLY, It is *coram* JOHN FINCH, &c. *Juſticiariorum de gaolâ deliberand.* and he doth not ſay, *Juſticiariorum ad aſſiſas et ad gaolam deliberandum.*

THIRDLY, Becauſe the indictment is againſt him by the name of *Dominum* ST. JOHN's, without other addition.

FOURTHLY, Becauſe the indictment is, *quòd non acceſſit ad A. eccleſiam parochialem prædict.* and there is not any church mentioned before.

And THE COURT held, that none of the exceptions were material; and it was doubted whether any exception be good upon conviction of recuſancy; for the ſtatute of 3. *Jac.* 1. c. 4. ſ. 16, 17. is preciſe, that it ſhall not be void or diſcharged for default of form or other matter, until after conforming himſelf by coming to the church.

But

But afterwards, becauſe the judgment was not *ideo capiatur*, and the omiſſion thereof is apparent to the king's prejudice, and for that, upon every conviction in indictment, the judgment is *quòd capiatur*; for this cauſe the judgment was reverſed.

The king may reverſe a judgment of recuſancy, notwithſtanding 3. *Jac.* 1. c. 4. ſ. 16.

1. Show. 309. 5. Mod. 141. 1. Hawk. P. C. 25.

Middlemore *againſt* Goodale.

CASE 7.

Vide ante, Page 503.

BEAR, *for the defendant*, moved this Caſe again. And he took exception to the declaration, That it was not good, becauſe he brings the action as aſſignee of aſſignee of the covenantee; and ſhews, that the conveyance was made to the plaintiff and *Frances* his wife, and to the heirs of the huſband: and he brings the action ſole without naming his wife, who is yet alive, ſo it is not good; for he ought to have joined his wife with him in the action.—And ALL THE COURT, *abſente* BRAMPSTON, were of that opinion. Whereupon judgment was given for the defendant, *quòd querens nihil capiat per billam.*

If lands be conveyed with a covenant of further aſſurance, and afterwards aſſigned to *huſband and wife*, they muſt both join in an action on the covenant. Ante, 348.

S. C. Jones, 406.

1. Com. Dig. 572. 1. Roll. Abr. 348. Cro. Jac. 399. 3. Bulſt. 164. Dougl. 329. 3. Term Rep. 627.

Mann *againſt* the Biſhop of Briſtol, Robert Hide, and Richard Hide, *Incumbent.*

CASE 8.

Eaſter Term, 14. *Car.* 1. *Roll* 467.

QUARE IMPEDIT in the common pleas for the church of *Wootton Fits-pain*, in the county of *Dorſet*.

Jones, 407. 2. Roll. 49.

The plaintiff entitles himſelf to the advowſon, For that *Margaret Chubb* was ſeiſed in fee of the manor of *Wootton Fits-pain*, to which manor the advowſon was appendant, and upon the 12th *September*, 20. *Jac.* 1. let it to *Robert Cook* for years, *à die datus*: that on the 13th *September*, 20. *Jac.* 1. he entered and was poſſeſſed: and that *Margaret* by indenture the 13th *September*, 20. *Jac.* 1. granted the reverſion to *William Biſhop* and others, to the uſe of the ſaid *Margaret* for her life, and after to the uſe of *Joan Cook* and the heirs of her body: that afterward *Margaret* died, and *Joan* entered, and levied a fine to the ſaid *John Mann* of the ſaid manor, to which the ſaid advowſon was appendant; whereupon at the next avoidance the plaintiff preſented, &c.

The defendant *Robert Hide* confeſſeth the ſeiſin in fee of the ſaid *Margaret*, and that ſhe infeoffed him of the manor, to which the advowſon was appendant, whereby he preſented, &c.; and traverſeth the grant of the reverſion *modo et formâ*, &c.; and iſſue was taken thereupon.

Richard Hide, as incumbent, pleads, and entitles himſelf, For that *Margaret Chubb* being ſeiſed in fee on the 4th *Auguſt*, 19. *Jac.* 1. by her deed granted to *Robert Jacob* the firſt and next avoidance; and that *Robert Jacob* died and made ſuch a one his executor, who granted the next avoidance to the ſaid *Robert Hide*, who preſented thereto the defendant *Richard Hide*; and the iſſue upon this plea was "*non conceſſit.*"

1. Com. Dig. 284.

The jury upon theſe iſſues found a ſpecial verdict. On the firſt iſſue, they find the leaſe and grant of the reverſion, and that it was to the uſe of the ſaid *Margaret* during her life, and after to the uſe

MANN *against* The BISHOP of BRISTOL and OTHERS.

of *Robert Cook*, until *Joan Cook* came to the age of twenty-one years; and after to the use of *Matthew Chubb* and *Joan Cook*, and the heirs of the body of *Joan* by the said *Matthew* to be engendered; and after to the use of the said *Joan* and the heirs of her body; and after to the use of *Robert* and his heirs. And they find, that *Joan* accomplished her age of twenty-one years before this action brought, and that *Matthew* died without issue of the body of the said *Joan*; and that upon the 4th *August*, 19. *Jac.* 1. *Margaret* granted to the said *Robert Jacob*, "*durante vitâ ipsius* ROBERTI, *primam et proximam advocationem, &c.*" and that he died before the church became void.

The question was, Whether this were an absolute grant of the next avoidance, as it was pleaded, or not?

IT WAS ADJUDGED in the common pleas, *for the plaintiff, quòd non:* and this judgment was here affirmed; for it is not an absolute grant of the next avoidance, but it is limited to him to present to the advowson, if it becomes void during his life, and not that otherwise it should go to his executors.

HOLBORN, *for the plaintiff* in the writ of error, moved, that the issue being upon the grant of the reversion, Whether it were granted *modo et formâ prout?* the verdict found, that it was granted to the use of *Margaret* for life, and after to the use of, &c. *ut supra:* and although it be found that the estates were determined before the action brought, yet it should have been shewn; for there is no such grant, *modo et formâ prout.*

But GRIMSTON, *for the defendant*, argued, that these estates being determined need not be mentioned, especially in this possessory suit, the question being only for an avoidance fallen: and although the traverse be found, *quòd concessit modo et formâ*, that extends not to the uses limited, but *non concessit reversionem modo et formâ prout*; and it is found, *quòd concessit reversionem modo et formâ*, and the estates determined need not be mentioned; as 14. *Edw.* 4. *pl.* 1. feoffment to three, the one dies, it may be pleaded to be made to the survivors, not mentioning him that is dead.

ALL THE COURT being of that opinion, the judgment was affirmed.

CASE 9.

Evans and Cottington's Case.

Precedent of punishment inflicted upon rioters.

Cowp. 61. Dalt. 46. 2 Roll. Ab. 298. Dalt. c. 88. 2. Hale, 155. 1. Hawk. 298.

EVANS and *Cottington* and seven others were indicted for a grand riot, that they, with others there named, to the number of one thousand persons, made a rescous and assault upon *Henry Smith*, a bailiff, who by virtue of a warrant upon a bill of *Middlesex* against *William Cleer*, had arrested him, and was carrying him to prison, and they procured him to escape. The arrest was at *Charing-Cross*, in the parish of *St. Martin's*, in the county of *Middlesex*; and after the arrest, they assaulted the bailiffs and beat them: and the bailiffs putting the prisoner into a house for safe-keeping against the tumult, they assaulted the house; and notwithstanding a justice of peace, assisted by three constables, made proclamation for keeping the peace and for their departure, yet they continued their assault, breaking open the house, and with ladders taken from the king's house at *Whitehall* (where the king with his court were resident),

upon

upon the twenty-fourth of *March*, 13. *Car.* 1. in the afternoon of the ſaid day, made this riot and reſcous, and carried the priſoner away through the king's houſe, and cauſed him to eſcape (*a*). EVANS and COTTINGTON's CASE.

Upon this indictment nine of them being arraigned pleaded not guilty, and four of them, viz. *Evans*, *Cottington*, *Thomas Groom*, and *Heatley*, were found guilty, and five of them were found not guilty; but againſt three of them there was probable evidence, that they were aiding to this riot and reſcous, but the jury acquitted them. See the caſe of Rex v. Royce, 4. Burr. 2073.

Wherefore becauſe it was ſo great a riot and offence, being committed ſo near the court, it was adjudged, that the ſaid four perſons, which were ſo convicted, ſhould be committed to priſon, and every of them ſhould pay five hundred pounds fine to the king, and that every of them ſhould ſtand on the pillory at *Weſtminſter* and *Charing-Croſs*, where the riot was done; and that *Thomas Groom*, who was a cobler, and entered into the houſe with a drawn ſword and a kettle upon his head as an helmet to defend himſelf, ſhould ſtand upon the pillory with a ſword in his hand and a kettle upon his head, and ſhould be bound with good ſureties for their good behaviour before they ſhould be delivered: and the three which were acquitted, againſt whom was ſuch probable evidence, were bound to find ſureties for their good behaviour. By the common law riots and routs, when of an enormous nature, may be puniſhed not only by *fine* and *impriſonment*, but by *pillory*. Dalt. c. 46. 2. Roll. Ab. 208. 1. Hawk. P. C. 298.

(*a*) See the Riot Act, 1. Geo. 1. c. 5.

Thomas Barkham's Caſe. CASE 10.

THOMAS BARKHAM, upon a *habeas corpus* awarded to the Warden of the Fleet, was brought to the bar; and it was returned, that he was committed 11th *November* 1637 by warrant from the Lords of the Council to the Fleet, to remain there until other order given.—And for that there was not any cauſe of commitment mentioned either in the *mittimus* or return, THE COURT conceived he ought not to be detained in priſon; whereupon he was bailed. The king's bench will bail upon a commitment by the privy council where no cauſe is expreſſed. Ante, 133. 168. Poſt. 579. 552. 593.—2. Cro. 81. 219. See 2. Hale, 141. 2. Hawk. ch. 15. ſ. 70. 2. Bl. Rep. 756. 2. Wilſ. 195.

Lawſon's Caſe. CASE 11.

ONE *Lawſon*, at the ſame time, upon another writ of *habeas corpus* to the Warden of the Fleet, and returned, that he was committed 4th *May* 1638, by the Lords of the Council, and no cauſe ſhewn, was therefore let to bail. The return to a *hab. cor.* muſt ſhew the cauſe of commitment. Ante, 133.

Poſt. 579. 593.—2. Inſt. 55. Vaugh. 137. Palm. 558. 3. Com. Dig. 456. 2. Hawk. P. C. 169. 185.

Smith *againſt* Smith. CASE 12.

ASSISE of a rent-ſeck in the county of *Cambridge*. Upon a ſpecial verdict the caſe was, That a rent-ſeck was granted of four pounds a-year by *John Smith* to *Nathaniel* his ſon in fee, iſſuing out of an houſe called the *Unicorn*, in *Lynton*, payable at the *Annunciation* and *St. Michael* at the houſe of the ſaid *Nathaniel*, in *Lynton*, to begin at *Michaelmas* after his deceaſe, and gave ſixpence in name of ſeiſin, and for rent due at the *Annunciation* 1637, and ſix years before, and not paid, &c. A demand and non-payment of rent at the houſe out of which it iſſues, is a diſſeiſin of the rent, although by the grant it was made payable at another place. Poſt. 521.

SMITH *against* SMITH.

Bendl. 59. Plowd. 71. 4. Co. 73. 7. Co. 57. Cro. Eliz. 324. Co. Lit. 161. b. 202. 2. Roll. Ab. 427. Hob. 107. 4 Bac. Ab. 356.

The jury find the grant of the rent and ſeiſin given, and the demand at the ſaid houſe called THE UNICORN, at the ſaid Feaſt of the *Annunciation* 1637, and that none was there to pay it. The queſtion was, Whether this were a diſſeiſin for the rent arrear?

The doubt was, Whether it were a good demand for the rent at the Feaſt of the *Annunciation*, at the houſe out of which it was iſſuing, and not at the houſe where it was payable?

And it was reſolved by THE CHIEF JUSTICE and MYSELF, being Juſtices of aſſiſe, after advice had with other of the Judges, who were of the ſame opinion, that it was a good demand, and a diſſeiſin for not payment; and that this gift of ſixpence in name of ſeiſin was good ſeiſin: and the jury found all in damages, *viz.* twenty-four pounds, not mentioning it to be for arrearages of rent; and it was well enough, for the precedents warrant both ways. Whereupon it was adjudged for the plaintiff. *Vide Co. Lit.* 153. *b.* 7 *Co.* 18. 29. a. *and the Book of Entries, fol.* 78. & 79. *Hil.* 45. *Eliz. rot. in Com. Banc. Midd. Aſſiſe for a Rent-ſeck.*

See 4. Geo. 2. c. 28.

Michaelmas

14. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*
Sir William Jones, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Robert Berkley, *Knt.*
Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Anonymous.

CASE 1.

TRESPASS againſt huſband and wife for breaking his cloſe. After verdict for the plaintiff, the huſband died betwixt the day of the *niſi prius* and day *in banco*.

In treſpaſs againſt *baron and feme*, if the *baron* die between the *niſi prius* and day *in bank*, the writ ſhall be good againſt the *feme*. Ante, 232. Poſt. 574.

ARCHIBALD now moved, that no judgment ſhould be entered; for the huſband being dead, the action as to the wife is by the act of God abated: and for that cited 6. *Edw.* 3. *pl.* 295. 11. *Hen.* 7. *pl.* 6.

And it was held by ALL THE COURT, that the death of the plaintiff or defendant, after verdict by *niſi prius* and before the day *in banco*, ſhall abate the writ or bill: and although huſband and wife be but one perſon in law, yet foraſmuch as the huſband is dead before the day *in banco*, no judgment may be entered; and if it be entered, it is error.

Cro. Jac. 19. 356. 646. 1. Sid. 131. 243. 3. Leon. 5. 2. Stra. 1063. B. R. H. 395. 1. Wilſ. 124. 302. 2. Mod. 115. Carth. 475. 1. Com. Dig. 56. 78. 1. Bac. Ab. 10. 4. Bac. Ab. 39.

But becauſe this is in an action of treſpaſs which is but perſonal, and is joint and ſeveral, THE COURT doubted; for it is clear, if the wife had been dead, and the huſband ſurvived, judgment ſhould have been entered againſt him: and the reaſon is the ſame, that ſhe ſurviving ſhould be chargeable for the treſpaſs. But whether the bill ſhall abate, THE COURT would adviſe; *per quod adjournatur.*

See 17. Car. 2. c. 8. and 8. & 9. Will 3. c. 10.

Ceely *againſt* Hoſkins.

CASE 2.

Hilary Term, 13. *Car.* 1. *Roll* 696.

ERROR of a judgment in the common pleas in an action for theſe words: "Thou art forſworn in a court of record, and "that I will prove." After verdict, upon not guilty, and found for the plaintiff, the defendant *there* moving that theſe words were not actionable, and judgment being there given for the defendant, a writ of error was brought and aſſigned in point of judgment.

"Thou art forſworn in a "court of record" are actionable, without ſtating in what court; and, after reverſal, the court of error will give judgment.

ROLLE, *for the plaintiff* in error, moved to have the judgment reverſed, Becauſe the words are very ſlanderous; and as much as if he had ſaid, "He was a perjured perſon."

1. Roll. Abr. 42. 774. Salk. 262. 401. 2. Saund. 256. 1. Lev. 310. Carth. 181.

But MAYNARD, *for the defendant* in error, ſaid, That it had been much debated in the common pleas, and the Court there agreed, that the action would not lie; and he conceived the reaſon to be, becauſe he did not ſay in what court of record he was forſworn; nor

CELLY *against* HOSKINS.

nor that he was forſworn in giving any evidence to any jury: and it may be that he intended only that he was forſworn, not judicially, but in ordinary diſcourſe in ſome court of record.

But JONES, BERKLEY, and MYSELF held clearly, that the action well lay; and ſuch foreign intendment as MAYNARD pretended ſhall not be conceived; and it ſhall be taken that he ſpake theſe words maliciouſly, accuſing him of perjury, and for a falſe oath taken judicially upon judicial proceedings in a court of record, and ſhall be underſtood according to the common ſpeech and uſual intendment; as to ſay, ſuch a one is "a murderer" (not ſpeaking whom he murdered, or when), an action lies; and it ſhall not be intended that he was a murderer of hares, unleſs ſuch foreign intendment be diſcovered or ſhewn in pleading. Wherefore they all held, that the judgment is erroneous: but becauſe BRAMPSTON was abſent, they would adviſe.—And afterwards the judgment was reverſed, and the plaintiff recovered.

CASE 3.

Morley *againſt* Pragnel.

Trinity Term, 14. *Car.* 1. *Roll* 549.

A tallow-furnace erected in the neighbourhood of other houſes is a nuſance.

2. Roll. Ab. 139. Hutt. 136. Palm. 536. Vent. 26. Keb. 500. 3. Bl. Com. 217. Salk. 458. 460. Ld. Ray. 1163. 1. Com. Dig. 214. Strange, 704. 1. Burr. 333. 1. Hawk. P. C. ch. 75. ſ. 10, 11.

ACTION ON THE CASE. Whereas the plaintiff is owner of a common inn in *Eaſtgeſtock*, that the defendant maliciouſly erected a *tallow furnace*, and boiled therein much ſtinking tallow, to the great annoyance of him and his gueſts; and by reaſon of ſuch ſtench, ariſing thereupon, many of his gueſts left his houſe, and many of his family became unhealthful. Upon not guilty pleaded, a verdict was found for the plaintiff.

GERMYN, *Serjeant*, moved in arreſt of judgment, that an action lies not, for he, being a tallow-chandler, ought to uſe his trade, which cannot be ſaid to be a nuſance.

But ALL THE COURT held, that as the declaration is penned the action is maintainable; for every one ought *ſic uti ſuo, quòd alienum non lædat*: then when the plaintiff is an inn-keeper, the defendant erecting a tallow-furnace annoyed his houſe with ſtenches, eſpecially by boiling ſtinking ſtuff: and ſo in *Tohayles's Caſe*, who erected a tallow-furnace acroſs the ſtreet of *Denmark-houſe* in the *Strand*, it was found a nuſance upon the indictment, and adjudged to be removed. Whereupon judgment was here given for the plaintiff.

CASE 4.

Jeffryes *againſt* Payhem.

Trinity Term, 14. *Car.* 1. *Roll* 528.

In ſlander, words ſhall be conſtrued according to their common acceptation. Ante, 122. 260. 277. Poſt. 516.

4. Co. 13. 19. 1. Roll. Ab. 129.

ACTION for theſe words of the plaintiff, being an attorney: "He is a baſe cheating cozening knave, and hath cheated me "as never any man was cheated."

The queſtion was, Whether an action would lie for theſe words? for if he had not ſhewn that he was an attorney, an action would not have lien; and as it is laid barely without any circumſtance, it doth not appear that it toucheth him in his profeſſion.

THE COURT therefore would adviſe,

Cro. Jac. 158. 166. Sayer, 265. Ld. Raym. 959.

The

The King *againſt* Sir John Dryden and three Others.

Case 5.

ON a writ of right of advowſon the parties being at iſſue, and put upon the grand aſſiſe, there iſſued thereupon a *venire facias*, to return *quatuor milites*, that they *cum ſeipſis* ſhould return twelve others, who, with the ſaid four, ſhould make a jury returnable *Octabis Michaelis*. Upon the day of eſſoins, *viz.* 16th *October* 14. *Car.* 1. the demandant appeared and prayed, that the tenants be demanded: and before BERKLEY, *Juſtice*, who only kept the eſſoins, the tenants being demanded, *James Turlow*, their attorney, appeared; and the demandant prayed, that their default might be recorded, for they ought to appear in perſon.—BERKLEY, *Juſtice*, held, that they might well appear by their attorney, who was admitted before upon the record.

In a writ of right the tenant may appear by attorney; and an eſſoin caſt, if it can be caſt in this caſe, is void after appearance recorded; but *quære*, Whether the four knights on the grand aſſiſe can be challenged; or, whether they may elect more than twelve companions? See the continuation of this caſe poſt. 574. 583. 585, 589.

Afterward he prayed for the tenants, that they might be eſſoined; which being contradicted by the plaintiff, BERKLEY, *Juſtice*, cauſed the prayer to be entered.

Afterward the four knights being called appeared, and they were appointed to chuſe others to them; and there being a queſtion about the number, they were appointed to chuſe twenty to them to make a number complete (as the clerks ſaid was the courſe).

BUT NOW being moved in full Term, it was reſolved,

FIRST, That the tenants may appear by attorney.

SECONDLY, That the eſſoin caſt was not allowable, becauſe the appearance by their attorney was entered and recorded; and if an eſſoin would lie, it ſhould be as well caſt for the attorney as for the tenants: and when an appearance by their attorney is recorded, they cannot at the ſame time be eſſoined; wherefore for this cauſe the eſſoin caſt was diſallowed.

THIRDLY, The queſtion was, Whether this *eſſier* of twenty to the four knights be good; or, whether they ought to chuſe and return twelve only; and if there ought to be twelve only returned, whether the return of twenty makes not the whole return void; or that it ſhall be good for the twelve, and ſurpluſage for eight?—Hereof THE COURT would adviſe (*a*); and, Whether there might be any challenge againſt any of the four knights (*b*), becauſe no exception was taken againſt them the firſt day? *Vide* 15. *Edw.* 4. *pl.* 1. 39. *Edw.* 3. *pl.* 2. 7. *Hen.* 4. *pl.* 2. 22. *Edw.* 3. *pl.* 18.

Moor, 67. Co. Lit. 159. a. note (2). Booth on Real Act. 96, 97.

(*a*) In S. C. 2. Roll. Ab. 674. it is ſaid, the Court held the return good.

(*b*) See 24. Geo. 2. c. 18. by which this cauſe of challenge is taken away. See alſo on this point 2. Hawk. P. C. 580.

Mulcarry and —— *againſt* Eyres and Others.

Case 6.

Michaelmas Term, 13. *Car.* 1. *Roll* 333.

ERROR of a judgment in the king's bench in *Ireland*, in an ejectment of a leaſe by the *Earl of Tumond* of forty meſſuages, five hundred acres of land, forty acres of meadow, two hundred acres of paſture, one hundred acres of BOG, and one hundred acres of BRUERY, in the villages and territories of *D. S.* and *V.*

On a *conditim*, that a leſſee ſhall not aſſign without licence, if the leſſor, after notice of an aſſignment without licence, accept of rent from the aſſignee, he diſpenſes with the condition.

Upon not guilty pleaded, a ſpecial verdict was found, That the *Earl of Tumond*, being ſeiſed in fee, let it to the plaintiff for one-and-twenty years, rendering rent, with condition that he ſhould not let or alien any part above three years; and if he did, that the leaſe

Mc.CARRY and —— *againſt* EYRES and OTHERS.

1 Roll. Abr. 876. 774. 3. Co. 64. Co. Lit. 52. 215. Cro. Eliz. 553. 572. Cro. Jac. 398. 2. Leon. 134. Poph. 25. 53. 1. Burr. 139. Cowp. 482. 2. Term Rep. 425.

leaſe ſhould be void, and he re-enter: and he let for three years; and ſo from three years to three years, during the term of his life, if he lived ſo long: and the earl, after this aſſignment, accepted the rent due from the aſſignee, and notwithſtanding re-entered, and made this leaſe to the plaintiff: and the defendant re-entered.

The queſtions made in *Ireland* upon this leaſe were, FIRST, Whether it were a breach of the condition? SECONDLY, Whether the acceptance of the rent by the hand of the aſſignee makes it good, and diſpenſeth with the breach, eſpecially the acceptance being at another rent-day? And it was reſolved *there*, and adjudged for the defendant.

But THE COURT *here* reſolved, that it was a plain breach of the condition, and the acceptance after might not diſpenſe with the condition, ſeeing it was that it ſhould be void; ſo it was abſolutely determined.

Ejectment will lie in *Ireland* for ſo many acres of *bog*.

Poſt. 555. Dougl. 305.

GRIMSTON then took an exception to the declaration, That one hundred acres of *bog* was not good; for there is not any ſuch word known: but it was held to be an uſual word there and well known (*a*); and if it were not, yet the plaintiff might releaſe his demand as to that land, and have his judgment for the reſidue.

Ejectment for land lying in ſuch *villages and territories* is good.

ANOTHER EXCEPTION taken by him was, Becauſe it was *in villis et territoriis*.—But it was held to be well enough, for they be of the ſame ſenſe; and if not, it is but ſurpluſage for *territoriis*.

Whereupon rule was given, that judgment ſhould be reverſed, unleſs other cauſe were ſhewn.—And afterwards, being moved again, the judgment was reverſed; and judgment given for the plaintiff, *quòd recuperet terminum ſuum prædictum*.

The writ of poſſeſſion on reverſing a judgment in ejectment from *Ireland*, is to be directed to THE CHIEF JUSTICE. 2. Saund. 256. Cro. Jac. 533. Yelv. 118. 4. Burr. 2156. 5. Com. Dig. 303.

It was moved how the *habere facias poſſeſſionem* ſhould be awarded; —AND RESOLVED, that there ſhould be a writ directed to the CHIEF JUSTICE in *Ireland* to reverſe that judgment, and commanding to award execution (*b*).

(*a*) Strange, 71. it will lie for a mountain in Ireland, or for alder car in Norfolk. Stra. 1063. 1084. 1. Burr. 139. 623. 5. Com. Dig. 273, 274.

(*b*) By 22. Geo. 3. c. 53. and 23. Geo. 3. c. 28. no writ of error or appeal ſhall be received or adjudged, or any other proceedings be had by or in any of his majeſty's courts in this kingdom in any action or ſuit at law or in equity inſtituted in any of his majeſty's courts in *Ireland*.

CASE 7.

Thomas Smith *againſt* Richard Cooker.

Trinity Term, 14. *Car.* I. *Roll* 1499.

An action will lie by huſband alone, for ſaying, "Thou and thy "wife are "witches, and "have bewitched my mare," *innuendo* the mare of "the "*plaintiff*," inſtead of "the "*defendant*."

S. C. Jones, 409. 1 Roll. Ab. 84.

ACTION for theſe words of the plaintiff: "Thou and thy "wife," *innuendo* the plaintiff and *Agnes* his wife, "are both "witches, and have bewitched my mare," *innuendo* the mare of the ſaid *Thomas*, where it ought to have been "the mare of the ſaid "*Richard*."

After verdict, upon not guilty, for the plaintiff, it was moved in arreſt of judgment for the defendant, Becauſe that two cannot commit one witchcraft; alſo it cannot be the mare of the plaintiff and the mare of the defendant, as *prædicti* THOMÆ imports.

Sed non allocatur: for the words ought to be referred as they were ſpoken, *viz.* that both of them bewitched my mare; and "*both*"

Cro. Jac. 102. Dyer, 29. Gouldſ. 76. 1. Bac. Abr. 33. 4. Bac. Abr. 10.

refers

refers to each of them, that they had ſeverally committed the offence: for if a man ſaith to two, "You both have murdered *J. S.*" each of them ſhall have his action ſeverally, and not jointly, as THE YEAR-BOOK 28. *Hen.* 8. *pl.* 19. is: and for the laſt words, *innuendo* the mare of *Thomas*, *Thomas* is repugnant to the precedent words, &c. Therefore judgment was given for the plaintiff.

SMITH *againſt* COOKER.

Anonymous.

CASE 8.

TRESPASS of aſſault and battery againſt huſband and wife for a battery done by the wife. The defendants being found guilty, the queſtion was, Whether a *quòd capiatur* ſhould be entered againſt huſband and wife?—And IT WAS RESOLVED, that a *quòd capiatur* ſhall be againſt the huſband only. And KEELING, *Clerk of the Crown*, and HODSDEN, *the Secondary*, informed the Court, that ſo were all the precedents, although the wrong is only done by the wife.

Judgment againſt huſband and wife for a battery by the wife, the *capias* ſhall be againſt the huſband only. Ante, 407. *contra.*

Cro. Jac. 203. 225. Moor, 704. Stra. 1167. 1237. 3. Bl. Com. 414. 1. Wilſ. 149. 1. Cromp. Prac. 348.—See 5. & 6. Will. & Mary, c. 12. Carth. 390. 5. Mod. 285.

Kemp *againſt* Barnard.

CASE 9.

Hilary Term, 13. *Car.* 1. *Roll* 1252.

UPON a ſpecial verdict the queſtion was, Whether a leaſe by the king, under the exchequer-ſeal, of lands uſually demiſed to one for life, remainder for life, remainder to a third for life, reſerving the uſual rent, ſhall be good or not?

A leaſe for years of crown lands under the exchequer-ſeal is good. Poſt. 528. Ante, 100. 175. 2. Roll. Ab. 182. Cro. Jac. 109. 2. Co. 16. b. 1. And. 4. Com. Dig. 393.

MAYNARD, *for the defendant*, very much urged, that it could not be but under the great ſeal; for a freehold cannot paſs from the king but by patent under the great ſeal.

But ALL THE JUSTICES held, that leaſes for life under the exchequer-ſeal, being of lands uſually leaſed, and reſerving the ancient rent, are allowable and good for the king's benefit, that his land ſhall not lie unletten.—And JONES affirmed, that all the Barons of the exchequer ſaid, that it was their courſe to demiſe as well for life as for years, and it hath always been ſo allowed; and of their courſe there this Court ſhall take conuſance, as it is in *Lane's Caſe* (*a*). And for this cauſe rule was given, that judgment ſhould be entered accordingly, unleſs, &c.

(*a*) 2. Co. 16.

Talory *againſt* Jackſon.

CASE 10.

Trinity Term, 14. *Car.* 1. *Roll* 187.

DEBT upon the 2. *Edw.* 6. c. 13. for carrying away his corn, the tithes not being ſet out 20. *Jac.* 1. and 21. *Jac.* 1. and ſo until 11. *Car.* 1. The defendant pleaded for the laſt three years *non debet*, and for the reſidue, the ſtatute of 21. *Jac.* 1. c. 16. of Limitations. And hereupon the plaintiff demurred; and the record being read, ALL THE COURT held, that the ſtatute doth not extend to this action.

The ſtatute of Limitations does not extend to 2. *Edw.* 6. c. 13. 1. Sid. 306. 1. Lev. 191. 1. Saund 38. 5. Com. Dig. 532. Dunb. 213.

Whereupon ROLLE, *for the defendant*, moved, that the demurrer ſhould be waived, and they would plead *non debet* for all.—But THE COURT ſaid, it could not be without the plaintiff's conſent.

A demurrer once joined cannot be waived without conſent. Ante, 347.—Barnes, 155. 1. Burr. 316. 5. Com. Dig. 136. 532. 4. Bac. Abr. 131. See 8. & 9. Will. 3. c. 11.

Sir

CASE 11.

Sir John Fitzherbert *againſt* Sir Edward Leach.

A writ of error lies in the exchequer chamber upon *errors of fact* as well as *errors of law*.

ERROR in the exchequer chamber of a judgment given in an ejectment in the king's bench. The plaintiff aſſigns for error. That whereas FIVE were named defendants, and in the record it is mentioned, that after the verdict againſt them all, and after the laſt continuance, TWO of the defendants were dead, as the plaintiff ſurmiſed, and the defendants *hoc non dicerunt ſed cognoverunt fore verum* the judgment is entered againſt the three; that the TWO did not die ſince the laſt continuance made upon the roll, but long time before the verdict, and before divers continuances upon the roll entered. Whereupon BANKS, *the King's Attorney*, moved, that it might be examined in this court.—But THE COURT held, that they might not here make any ſuch examination, being after the judgment entered (*a*).

An eſſoin in deed is aſſignable in the exchequer chamber on 27. *Eliz.* c. 8.

Cro. Eliz. 731. Cro. Jac. 5.

And then it was moved, Whether an *error in deed* be aſſignable in the exchequer-chamber upon the 27. *Eliz.* c. 8.? becauſe, as BERKLEY ſaid, the ſtatute only gives authority to examine *errors in law*.—But BRAMPSTON, JONES, and MYSELF held, that it is well aſſignable; for the ſtatute giving the writ of error, gives that authority as well to examine errors in deed as errors in law. Hobart, 5. 2. Lev. 38. 1. Vent. 207. 2. Mod. 194. 5. Com. Dig. 287. 2. Bac. Ab. 112.

If an error in fact be aſſigned on the 27. *Eliz.* c. 8. it may be tried by writ of *niſi prius* in the exchequer chamber.

Then it was moved how it ſhould be tried: and HODSDEN, *the Secondary*, ſaid, that it hath been tried by *niſi prius* out of the exchequer chamber; and there be divers precedents to that purpoſe.—But JONES ſaid, he doubted thereof, becauſe the ſtatute gives this power to the Juſtices of the one bench and the other; and that the court of the exchequer chamber is newly erected. And BERKLEY held, that it was not the intent of the 27. *Eliz.* c. 8. to give them ſuch authority. But BRAMPSTON, *Chief Juſtice*, and MYSELF doubted thereof, becauſe the ſtatute giving authority to reverſe or affirm, implies an allowance of the means to do it. Whereupon *adjournatur.—Mich.* 42. & 43. *Eliz. Roll* 335. *Rew v. Long* (*b*), error in the exchequer chamber *in fait* aſſigned and tried by *niſi prius*, and found, and for that cauſe reverſed: and the like caſe in *Hilary Term*, 16. *Jac.* 1. *Roll* 75. error *in fait* aſſigned there, and tried by *niſi prius*. *Conſimile* in *Michaelmas Term*, 10. *Car.* 1. *Roll* 169. in the caſe of *Smith v. Marchant* (*c*).

(*a*) Jones, 410. Moor, 469. 1. Burr. 365. Ld. Raym. 717. Sid. 385. Salk. 8. Carth. 181.
(*b*) Cro. Jac. 5.
(*c*) See 17. Car. 2. c. 8.

CASE 12.

Thornton *againſt* Lyſter.

In an action of aſſault and battery laid on 1ſt *Auguſt*, and a juſtification of *ſon aſſault* on the ſame day, the plaintiff may give evidence of an aſſault on the 9th *July* preceding; for the day is not material. Ante, 229. 2. Roll. Ab. 680. 687.

TRESPASS of aſſault, battery, and wounding, on the firſt of *Auguſt* 13. *Car.* 1. The defendant juſtifies in his own defence, by reaſon of an aſſault made by the plaintiff; and iſſue joined thereupon. The defendant gives in evidence aſſault and battery by the plaintiff on the ſecond day of *July* 13. *Car.* 1. before, and that it was in his own defence; and produced divers witneſſes to prove it. The plaintiff ſhews, that the battery which he intended was on the ninth day of *July* 13. *Car.* 1.; and produced alſo divers witneſſes to prove that.

LITTLETON, *the King's Solicitor*, and others of counſel with the defendant, inſiſted, that it was no evidence; for the plaintiff ought to have made a ſpecial replication, and ſhewn that ſpecial matter.

Dyer, 23. Co. Lit. 282. b. Brownl. 233. Bull. N. P. 17.

But

But ALL THE COURT held, it was not requiſite: and if another day had been ſhewn in the replication, it ſhould be a departure; but it ſufficeth to ſhew it in evidence to be done at another day *ſans ſon aſſault*, for the day is not material. THORNTON *againſt* LYSTER.

JONES ſaid, if they had both agreed upon one day, it ſhould have been ſpecially pleaded: but BRAMPSTON held, it was all one; and as it is now pleaded to be at ſeveral days, it is clearly unneceſſary. To *aſſault* laid 9th *Auguſt*, and plea of *ſon aſſault* on 2d *July*, in pleading.

a replication that the aſſault intended was on 9th *July*, is a *departure*

The Solicitor urged, that it ſhould be found ſpecially: but THE COURT ſaid, it was ſo clear, they would not have it ſo found. And the jury gave one hundred pounds damages (*a*). The Court will not adviſe a ſpecial verdict in a clear caſe.

(*a*) This caſe is denied in Llo d v. Jones and Others, Eaſter Term, 13. Geo. 1. and 2. Roll. Ab. 680. pl. 3. is good law. 6. Mod. 120. 2. Ld. Ray. 1015.—*L. C. B.* PARKER's *MSS.*

Latham *againſt* Atwood. CASE 13.

Michaelmas Term, 11. *Car.* 1. *Roll*

TROVER AND CONVERSION of two hundred and fifty pounds of hops. Upon not guilty pleaded, the caſe appeared to be, Hops growing out of ancient roots are like *emblements*, and ſhall go to the perſonal repreſentatives of a tenant for life, and not to him in remainder.

A woman, tenant for life, takes to huſband the plaintiff 5. *Car.* 1. the remainder being to the defendant for his life. Theſe hops were growing out of ancient roots, being within the land in queſtion: the wife dies the 19th *Auguſt* 9. *Car.* 1. the hops then growing and not ſevered, &c.

The queſtion was, Whether theſe hops appertained to the huſband or to him in remainder? becauſe ſhe died ſo ſmall a while before the gathering of them; and they are ſuch things as grow by manurance and induſtry of the owner, by the making of hills and ſetting poles. 10. *Edw.* 4. pl. 1. 21. *Hen.* 6. pl. 30. Owen, 102. Co. Lit. 56. a. 1. Roll. Ab. 728. 1. Com. Dig. 598.

THE COURT, upon the motion of GRIMSTON, who was of counſel with the plaintiff, held, that they are like emblements, which ſhall go to the huſband or executor of the tenant for life, and not to him in remainder; and are not to be compared to apples or nuts, which grow of themſelves. Wherefore adjudged for the plaintiff.

Bayns *againſt* Brighton. CASE 14.

DEBT for forty ſhillings upon a bill obligatory; and declares, That the defendant by his bill dated *February* confeſſed himſelf to be indebted to the plaintiff in twenty ſhillings, *ſolvendum* at *Michaelmas* following, *ad quam quidem ſolutionem faciend.* he did oblige himſelf in forty ſhillings; and for non-payment of the forty ſhillings the action was brought. The defendant pleaded, that at the time of the obligation making he was within age; and iſſue thereupon, and found for the plaintiff. In debt on bond for the penalty on non-payment of the principal ſum, it muſt be averred that it was not paid at the day.

And GERMYN, *Serjeant*, now moved in arreſt of judgment, That the declaration was ill, becauſe it is not therein alledged that the twenty ſhillings was not paid at the day; for if otherwiſe, the forty ſhillings is not due. Cro. Eliz. 537. 4. Com. Dig. 281. Dougl. 215. 2. Term Rep. 388.

ALL THE COURT was of that opinion; for it is not an obligation with a condition. Whereupon rule was given, that judgment ſhould be entered for the defendant, unleſs, &c.

Anonymous.

Case 15.

Anonymous.

To call an attorney a *base rogue* and a *cheating knave* is actionable. Ante, 229. 417. 460. 510. Post. 552.

ERROR of a judgment in the common pleas in an action for words. Whereas the plaintiff being an attorney, and maintaining himſelf his wife and children by his practice, that the defendant ſpake theſe words of him and of his office: "He is a very "baſe rogue, and a cheating knave, and doth maintain himſelf his "wife and children by his cheating." Upon not guilty pleaded, and verdict for the plaintiff, and judgment given, the error aſſigned was, That an action lay not for theſe words.—But ALL THE COURT held, that the action was maintainable; for it toucheth him in his profeſſion. Whereupon judgment was affirmed.

1. Roll. Ab. 52. Cro. Jac. 339. 427. 586. Moor, 61. 855. Allen, 13. Hob. 2. Mod. 272. 9. Godb. 214. Latch. 21. 1. Brownl. 16. 1. Vent. 117. Hutt. 104. Lev. 72. 1. Lev. 297. 1. Sid. 327. 3. Wilſ. 59. Stra. 1138.

Case 16.

Davenport *againſt* Penſell.

Trinity Term, 14. *Car.* 1. *Roll* 698.

In *aſſumpſit* againſt an adminiſtrator *durante minore ætate*, the defendant may plead that the executor was above the age of ſeventeen at the time of the promiſe.

ASSUMPSIT againſt an adminiſtrator *durante minore ætate* of *J. S.* upon a promiſe to pay for forbearance of a ſum, &c.

The defendant pleads, that the ſaid *J. S.* was above the age of ſeventeen years at the time of the promiſe; and thereupon it was demurred.

Qu. If an adminiſtration *durante minore ætate* inſtantly determines upon the minor's attaining ſeventeen years of age. Ante, 240.

The queſtion was, Whether the adminiſtration ſo committed *durante minore ætate* inſtantly determined by his coming of ſeventeen years of age; for then the adminiſtration ceaſing, there cannot after be any conſideration to ground a promiſe?

It was urged, that in our law *minor ætas* was one-and-twenty years.

But GRIMSTON, of counſel with the plaintiff, ſaid, that this was to be conſidered according to the civil law, which appoints ſeventeen years to be full age in ſuch a caſe. 5. *Co.* 29.—*Et Curia advi-ſare vult.*

Gould. 136. Moor, 462. Lut. 342. 1. Roll. Abr. 526. 910. 5. Co. 29. Cro. Eliz. 602. 5. Mod. 395. 2. Vent. 378. Yelv. 128. 2. Roll. Rep. 186. 404. 409. 466. 2. Sid. 40. 60. Hob. 251. Vaugh. 93. 5. Com. Dig. 207.

Case 17.

Appleton *againſt* Stoughton.

Hilary Term, 10. *Car.* 1. *Roll.* 256.

A *point-maker* is a trade within the penalties of the 5. *Eliz.* c. 4.

DEBT upon the 5. *Eliz.* c. 4. ſ. 31. and demands twenty-two pounds, becauſe he uſed within *London* the trade of A POINT-MAKER for the ſpace of eleven months, not being brought up *as* an apprentice for ſeven years.

A cuſtom to uſe a trade to which a perſon has not ſerved as apprentice is good againſt 5. *Eliz.* c. 4. Ante, 347. 361.

The defendant pleaded the cuſtom of *London*, that any who is a freeman of one trade, may uſe any other trade within the city; and pleaded the 7. *Rich.* 2. c. . which confirms the cuſtoms of *London*, &c.: and upon this plea a demurrer was tendered.

8. Mod. 313. Salk. 610. 6. Mod. 21. Carth. 162. 8. Co. 126.

The queſtion was, Whether ſuch a cuſtom may be good againſt the ſtatute of 5. *Eliz.* c. 4.?

But becauſe it was a general ſtatute, THE COURT inclined in opinion, that this cuſtom might be good, and not taken away by the ſaid ſtatute, being a ſpecial cuſtom in a particular place.

The

The plaintiff then took iſſue upon the cuſtom, and the defendant joined; and the plaintiff ſurmiſed, that there is a cuſtom in *London*, that if any cuſtom of *London* be pleaded, and denied, and iſſue thereupon, it ſhall be tried by a writ to the mayor and aldermen, to certify whether there be ſuch a cuſtom; and they ſhall make their certificate by the mouth of their recorder *ore tenus*; and prayed to have a writ to certify. And becauſe the defendant *hoc non didicit*, a writ was awarded accordingly.

The cuſtoms of *London* ſhall be tried by the certificate of THE RECORDER *ore tenus* on a writ directed to the mayor and aldermen.
Ante, 361.

Co. Lit. 74. 2. Inſt. 126. 2. Roll. Abr. 579. 581. Hob. 86. 2. Com. Dig. 16. 1. Burr. 248. 1. Bl. Com. 77. Douglas, 378.

THE RECORDER certified, that there was no ſuch cuſtom for one who uſeth a manual trade, that he may exerciſe any other trade, not being apprentice, or brought up thereto; but that there was ſuch a cuſtom concerning trades of buying and ſelling, as mercer, grocer, &c.

An *artificer* cannot, by the cuſtom of *London*, uſe a different art than that to which he was apprentice; but a *chapman* may. 2. Roll. Rep. 10. 1. Saund. 311. 4. Mod. 145. Ld. Ray. 513. 1034. Stra. 552. 10. Mod. 148. 11. Mod. 63. 12. Mod. 251.

And after this certificate it was moved, that this was a miſ-trial; for it being a cuſtom which concerns all the citizens, ought not to be tried by ſuch a certificate, but by jury.

A cuſtom of *London*, that a freeman of one trade may uſe any other within the city, ſhall be tried by *certificate*, and not by *jury*.
Ante, 248. 361.

BULSTRODE, who argued *for the defendant*, inſiſted much upon a caſe in the common pleas, reported by *Lord Hobart* (*a*), that a cuſtom of *London*, which concerns all the citizens, ſhall be tried *per pais*.

But after long deliberation it was reſolved by ALL THE COURT, that the trial was good, eſpecially when the plaintiff hath ſhewn, that there is ſuch a cuſtom that it ſhall be ſo certified, and the defendant hath confeſſed it; ſo as this manner of trial, being as it were by his conſent, he ſhall not after ſuch trial except againſt it. And this cuſtom doth not concern all the perſons of *London*, but only thoſe who uſe manual trades; as if the cuſtom to deviſe in mortmain, or of foreign attachments, had been tried by certificate, ſo here the trial is good. And it was adjudged for the plaintiff. 4. *Co.* 30. 39. *Hen.* 6. 34. 9. *Co.* 31. *Brook* "*London*," 27. 21. *Edw.* 4. 4. 33. *Hen.* 8. *Brook* "*Trials*," 14.

Hob. 86. 2. Roll. Ab. 579. 2. Com. Dig. 16. 4. Com. Dig. 199. 3. Bac. Ab. 533. 1. Wilſ. 8.

(*a*) Day *v.* Savage, Hobart, 86.

Tomlins *againſt* Brett.

CASE 18.

ERROR of a judgment in the common pleas in FORMEDON *in deſcender*; where the tenant vouched *John Style*, and the demandant counterpleads, that the ſaid *John Style*, or any of his anceſtors, &c. *nunquam aliquod in tenementis*, &c. omitting the word *habuerunt*. And iſſue being joined, and *niſi prius* awarded, at the day of the *niſi prius* the defendant made default: and at the day *in banco* he made another default; whereupon a *grand cape* was awarded, and judgment given:

A writ of error will not lie after an inqueſt taken on default.
Jones, 422. 2. Roll. Ab. 430. Salk. 216. 579. Strange, 46. 612. 1. Term Rep. 279. 2. Term Rep. 87.

And now error brought, Becauſe there was no iſſue joined by the tenant.

But THE COURT would not allow thereof, but affirmed the judgment; for after the default, the iſſue and the pleading is out of the court, and the judgment is only upon the default.

Case 19.

Aungell *against* Sir William Cooper.

Trinity Term, 10. *Car.* 1. *Roll* 1331.

On a *ſcire facias* to reverſe a judgment, and have execution againſt lands in ſeveral counties, if the ſheriff return that *A.* was *terre-tenant*, and *A.* denies the fact, and it is found that he is not tenant, it cannot be aſſigned for error that *A.* was dead before the trial was had.

Cro. Jac. 507.

ERROR of a judgment in the common pleas; where in a *ſcire facias* upon a judgment of nine hundred pounds, and execution thereupon, the defendant there being dead, the plaintiff ſurmiſed, that he was ſeiſed of lands in the counties of *Kent* and *Surry*, and prayed a *ſcire facias* into the ſeveral counties: and the ſheriff of *Kent* returned, that *Aungell* was *terre-tenant* of the land in the county of *Kent*; and the ſheriff of *Surry* returned, that one *Bell* and his wife were *terre-tenants* of the defendant's lands in *Surry*. Whereupon *Aungell*, being warned, took upon him the tenancy of the lands mentioned in the ſheriff's return; and pleaded, that another man in the ſame county at the time of the ſaid return had other lands, whereof *T. D.* was *terre-tenant*. *Sir William Cooper*, the then plaintiff, denied it; and iſſue thereupon, and found for the plaintiff, and judgment for him againſt *Aungell* the now plaintiff. But for the lands in *Surry*, *Bell* and his wife pleaded, that they were not tenants: and thereupon they were at iſſue; and found for them before the Juſtices of aſſiſe, and judgment given, *quòd eant inde ſine die*. And now *Aungell* brings error upon that judgment, and aſſigns for error, That the ſaid *Bell* was dead before the time of the trial: whereupon it was demurred.

And now argued at the bar by Maynard, *for the plaintiff* in the writ of error, that foraſmuch as the plaintiff is not to have his land charged ſole, if there be more land; and by the ſurmiſe of the defendant (who was plaintiff in the firſt ſuit) there is land in the county of *Surry* chargeable therewith; and by the ſheriff's return that *Bell* and his wife were *terre-tenants*, the finding by the jury, after the death of *Bell*, is void; and ſo the iſſue not tried, the judgment is erroneous; therefore he conceived, that the plaintiff may well aſſign it for error, and take advantage thereof.

But Rolle, *for the defendant* in the writ of error, ſhewed, that foraſmuch as there be two ſeveral *ſcire facias* into ſeveral counties, they be as ſeveral ſuits, the one not depending upon the other; and the proceedings are ſeveral: and although there be death, &c. alledged in the one, yet it is not material as to the other ſuit; nor is there any cauſe that the other, againſt whom the verdict is found, ſhould aſſign it for error: and he cited for this point 5. *Edw.* 4. *pl.* 7.

Poſt. 591. Ante, 416.

Brampston, Jones, and Myself was of that opinion: for although *Bell* be dead, it is not material to *Aungell*, ſpecially as it is found by this verdict that *Bell* was not tenant; ſo the Court is aſcertained that he was not tenant, although by death the verdict be void. Whereupon rule was given, that the judgment ſhould be affirmed.

See 8. & 9. Will. 3. c. 18.

Case 20.

Mounſon *againſt* Bourn.

If there be judgment againſt huſband and *wife executrix*, and a *devaſtavit* be proved during the coverture, the huſband ſhall be charged on the death of the wife.

ERROR of a judgment in the common pleas in Debt, by *William Bourn* againſt *Sir William Mounſon* and *Margaret* his wife, executrix of *Charles Earl of Nottingham*, for two hundred pounds.

The defendants appeared, and judgment was given againſt them of debt, and four pounds coſts *de bonis teſtatoris*, &c. *Et ſi non*, &c. *tunc de bonis propriis* for the four pounds for coſts.

Poſt. 564. 603.—1. Jones, 417. 1. Roll. Abr. 930. Palm. 312. Lutw. 671. 1. Sid. 337. 1. Salk. 116. Carth. 30. 3. Mod. 186.

This

This being in *London*, a *fieri facias* was awarded to the ſheriffs of *London*; who returned *nulla bona teſtatoris*, and for the four pounds *nulla bona*. Mounson *againſt* Bouan.

The plaintiff afterwards, upon a *teſtatum* that goods were ſold and eloined, procured a new *fieri facias*, reciting the judgment and the former writ and return thereof, *et quòd teſtatum exiſtit*, that they had goods ſufficient, and had eloined and ſold them; wherefore the ſheriffs of *London* were commanded, that they by inquiſition, *vel alio modo quòviſlibet quo conſtare poterit*, ſhould enquire if they had ſold or eloined the ſaid goods: and if it were ſo found, *quòd ſcire faciant* to the ſaid *Sir William Mounſon* and *Margaret* his wife, that they be in court in *Octab. Mich.* to anſwer thereto.

The ſheriff hereupon returned an inquiſition, finding the ſale and eloiner of the ſaid goods, and that they *ſcire fecerunt*, *&c.* And the parties appeared and demurred upon the writ.

THE COURT, after divers adjournments, adjudged the writ good, and that the defendants ſhould anſwer.

The defendants thereupon imparl: and afterwards judgment was given by *nihil dicit*, that the plaintiff ſhould have execution *de bonis ſuis propriis*. Upon this a writ of error was brought *tam in redditione judicii quàm in redditione executionis*.

TAYLOR, *for the plaintiff*, aſſigned error in the judgment, Becauſe it was *quòd recuperet* the damages *de bonis propriis*, *ſi non habeant bona teſtatoris*, where they appeared the firſt day upon the ſummons; and judgment given the ſame Term upon a *nihil dicit*, where they ought to have had judgment *de bonis teſtatoris*: for that purpoſe he cited 31. *Hen.* 6. 13. 33. *Hen.* 6. 23. 34. *Hen.* 6. 27.—*Sed non allocatur*; becauſe it is not the confeſſion, but the delay which is the cauſe the plaintiff ſhall recover damages *de bonis propriis*. Judgment for damages and coſts againſt huſband and *wife executrix* ſhall be *ſi non*, *&c de bonis propriis*. 1. Roll. Ab. 928. 933.

2. Saund. 107. Wentworth, 268. 2. Bl. Rep. 1276. Cowp. 289. 292.

SECONDLY, Whereas it was objected, that the judgment being *de bonis propriis* againſt the wife, and in law a *feme covert* hath not any goods, therefore the judgment ſhould be void:—IT WAS RESOLVED, that the judgment was well given; for the huſband being only charged in right of his wife, the judgment ſhall be againſt both, and ſhe may have goods as a term or chattel real before the coverture: alſo ſhe may have goods after her huſband's deceaſe. If a woman executrix waſte the goods *dum ſola*, judgment after coverture, on *devaſtavit* returned, ſhall be *de bonis propriis*.

1. Roll. Abr. 931. Cro. Jac. 191. 2. Lev. 145. 5. Com. Dig. 209.

THIRDLY, That a *devaſtavit* may well be by a wife by the eloining the goods, as a *feme covert* may do a *tort*, and be puniſhed for it: alſo this was a *devaſtavit* by the wife when ſhe was ſole.—And IT WAS HELD, that if a man takes an executrix to wife, and waſte the goods, it is a *devaſtavit* in the wife; for it was her folly to take ſuch an huſband who would make a *devaſtavit*.—And JONES ſaid, If there be a recovery againſt huſband and wife upon a *devaſtavit*, if the huſband ſurvive the wife, he ſhall be charged; alſo if the wife ſurvive, ſhe ſhall be charged: but if the recovery be not againſt huſband and wife in the life of the wife, and ſhe dies, the huſband ſhall not be charged. Whereto BRAMPSTON agreed. If a man marry an executrix and waſte the goods of the teſtator, it is a *devaſtavit* in the executrix. Poſt. 603. Dyer, 210. *in marg.* 5. Co. 27. 1. Lutw. 670. 1. Com. Dig. 249.

For the principal matter *I* delivered my opinion, that this writ is good, and the judgment good, as this caſe is; for they being re- On *nulla bona* to a *fieri facias* on a judgment Poſt. 527.

againſt an executor, the plaintiff may have a ſpecial *ſcire facias* ſuggeſting a *devaſtavit*. Dyer, 210. 5. Co. 32. Cro. Eliz. 859. Jones, 418. Sira. 440.

Mounson against Bolen.

turned "*warned*," and appearing and demurring upon the writ, which being adjudged good (as well it may, being a judicial writ, and framed by the diſcretion of the Court), and the party being warned, and not pleading or traverſing the *devaſtavit*, as he well might, there is great reaſon judgment ſhould be entered againſt them; for it was their folly they would not plead: and it is out of the miſchief put in *Pettifer's Caſe* (*a*).

(*a*) 5. Co. 32.

JONES and BRAMPSTON would not deliver any opinion on the firſt point, but would adviſe. BERKLEY was abſent and in chancery (*b*).

(*b*) It was moved again in Hilary Term, and all and that the the Judges gave their opinions *ſeriatim* in favour of the plaintiff, that the writ was good, judgment and execution ſhould be affirmed. Poſt. 528.

CASE 21.

Morrice and Others *againſt* Prince.

In an aſſiſe for arrears of a rent-charge deviſed to the plaintiff, if the jury find an arrear of thirty years, without finding when the deviſor died, the verdict is bad; for otherwiſe the certainty of the arrear cannot be known.

S.C. Jones, 413. S.C. 2. Roll. Abr. 424. 693. March, 97. Cro. Jac. 653. Noy, 125. 12. Mod. 561.

ERROR by *Thomas Morrice* and *Elizabeth* his wife againſt *Thomas Middleton*, *James Palmer*, *John Lewis*, *Evans Potham*, *J. S.* and *T. D.* of a judgment given againſt them in *an aſſiſe*, in the county of *Montgomery*, to their damage, &c.

Upon this the record was certified, that the aſſiſe was brought 5th *May*, 10. *Car.* 1. againſt the ſaid ſix defendants, and *Charles Vaughan* and *Margaret* his wife, *Sir Peter Mutton*, and ſix others (in all fifteen perſons), that the aſſiſe was *de libero tenemento ſuo* in *Brentdaigne*, and in five other villages within the ſaid county. The ſaid fifteen defendants being returned attached, the plaintiff makes his plaint to be diſſeiſed of his freehold, *viz.* of twenty pounds rent iſſuing out of forty meſſuages, one thouſand acres of land, fifty acres of meadow, &c. in the ſaid villages, within thirty years, &c. And for title he ſaith, that one *Edward Prince*, *Eſq.* was ſeiſed in fee of the tenements aforeſaid, in the villages, &c. and held them in ſoccage; and by his will in writing, 20th *December*, *anno* 1. *Jac.* 1. deviſed to the plaintiff a rent of twenty pounds *per annum*, iſſuing out of the ſaid tenements, for his life. And afterward the ſaid *Edward* died ſeiſed, and the ſaid tenements deſcended to the ſaid *Elizabeth* (who afterwards was married to the ſaid *Thomas Morrice*) and to the ſaid *Margaret* (who was after married to the ſaid *Charles Vaughan*): and that the plaintiff was ſeiſed of the ſaid rent by the hands of the ſaid *Thomas Morrice*, being ſeiſed of the freehold of the ſaid tenements in right of the ſaid *Elizabeth in forma prædicta*, until by the ſaid *John Morrice* and *Elizabeth* and the other thirteen defendants he was diſſeiſed; and thereupon brought this aſſiſe. The ſaid *Charles Vaughan* and *Margaret* and nine others of the defendants made default; wherefore *the aſſiſe* was awarded againſt them by default. Four others of the defendants, *viz.* *Thomas Morrice* and *Elizabeth* his wife, *Thomas Middleton* and *James Palmer*, pleaded, that they were tenants of an acre, parcel of the tenements put in view, and that *Roger Palmer* and *William Hewks* were tenants of the freehold of a meſſuage and four acres of land put in view, &c. who be not named in the writ; for which they demand judgment of the writ. *Et ſi, &c.* The jury find, that *Roger Palmer* and *William Hewks* were not tenants, &c.: and that the plaintiff was ſeiſed by the hands of the ſaid *Thomas Morrice prout*: and that the plaintiff demanded of the ſaid *Thomas Morrice* and his wife, *Thomas Middleton*, *James Palmer*, *John Lewis*, and

Evans

Evans Potham, the ſaid rent; and that they denied to pay it; and ſo they diſſeiſed him of the ſaid rent, and found arrearages for thirty years and an half: and for the other nine they find, that they *did* not diſſeiſe. And hereupon judgment was for the plaintiff againſt ſix; and for the nine, *quòd alieront ſans jour*. MORRICE and OTHERS, *againſt* PRINCE.

Upon this error was brought, and aſſigned principally, Becauſe he demanded rent by a deviſe; whereof arrearages are found for thirty years: and it doth not appear when the deviſor died, nor any time or feaſt appointed for the payment; and therefore the verdict is clearly ill, becauſe the time of the deviſor's death not appearing, the certainty of the arrearages cannot be known.

THE SECOND QUESTION was, If the jury finding *a feiſin* by the hands of one of the huſbands of the ſaid heirs, whereas the land deſcended to two daughters, whether this were a ſufficient finding of *the feiſin*?—And IT WAS RESOLVED that it was; as ſeiſin given by one jointenant, &c. A ſeiſin by one of two coparceners is good for both. 6. Co. 57. b. Booth, 214. Cowp. 219. Salk. 83.

THE THIRD QUESTION was, If the jury finding the demand of the rent from ſix of the defendants, and their denial of payment; and not finding that it was demanded upon the land (but that they ſo diſſeiſed the plaintiff), whether that were ſufficient?—For it was held by all the Juſtices, that the demanding of it of their perſons off the land, and their denial, is not ſufficient; for it ought to be upon the land: but this being upon a verdict in an aſſiſe, *I* held, that the Court ſhall intend it was a demand upon the land, as 33. *Edw.* 3. *title* "*Verdict*," 40. and *Co. lib.* 9.—But BRAMPSTON, JONES, and BERKLEY held, that it ſhall not be ſo intended. A demand of rent, and a refuſal of payment, is not a diſſeiſin of the rent, unleſs it be made upon the land. Ante, 508. Co. Lit. 153. 202. a. 315.

The judgment was reverſed, becauſe it was not found when the deviſor died.

See 4. Geo. 2. c. 28.

Lee *againſt* Boothby.

CASE 22.

UPON evidence to a jury at the bar for a copyhold, parcel of the manor of *Earls-Chingford*, in the county of *Eſſex*, the queſtion was, If a copyholder in fee ſurrender to the lord of the manor his copyhold eſtate, and the lord make a leaſe for years of the manor and of the ſaid copyhold, by the name of his tenement called *H.* whether it is a determination of the copyhold?—And it was held by ALL THE JUSTICES, *abſente* BRAMPSTON, that it was not, becauſe when he lets the manor, it is included as a parcel of the manor: but if he, though he had been but *dominus pro tempore*, or for half a year (though by parol) had made a leaſe for years of the copyhold by itſelf, that had deſtroyed the copyhold; for it was then, during that time, ſevered from the manor, and ſo could never afterward be demiſable again by copy: but the manor being demiſed, includes the copyhold as parcel of the manor, and the naming of the copyhold is ſurpluſage; and it remains always as parcel of the manor, and demiſable by copy as it was before (*a*). If the lord of a manor leaſe the manor and a copyhold by name, it will not extinguiſh the copyhold; but if he leaſe a copyhold by itſelf, it is gone *as a copyhold* for ever. Jones, 449. 2. Co. 17. a. 4. Co. 31. b. 1266. 1. Keb. 720. Hob. 181. 190. 215. Salk. 169.

Cro. Jac. 253. 573. 2. Sid. 82. 2. Vernon, 250. Gilb. Ten. 224. Skin. 192. Bunb. 138. (*a*) See the caſe of Reeve *v.* Jodrel, 2. Term Rep. B. R. 415.

Case 23.

Claxton *againſt* Libourn.

If iſſue of battle be joined, champions allowed, and ſecurity given to perform it, evidence that the champions were hired ought not to be received.

3. Inſt. 158. 22 Ruſh. 890. 1. Com. Dig. 587.

WRIT OF RIGHT in *Durham*. The tenant waged battail, which was accepted; and at the day to be performed, BERKLEY, *Juſtice*, there examined the champions of both parties, Whether they were not hired for money? And they confeſſed they were; which confeſſion he cauſed to be recorded, and gave further day to be adviſed. And by the king's direction all the Juſtices were required to deliver their opinions, Whether this were cauſe to de-arraign the battail by theſe champions?—And by BRAMPSTON, *Chief Juſtice*, DAMPORT, *Chief Baron*, DENHAM, HUTTON, JONES, MYSELF, and other Juſtices, it was ſubſcribed, That this exception, coming after the battail gaged, and champions allowed, and ſureties given to perform it, ought not to be received. *Bracton*, 161.

Case 24.

Goodwin *againſt* Anne Weſt.

Hilary Term, 13. *Car.* 1. *Roll* 1321.

Debt upon 5. *Eliz.* c. 9. ſ. 11. for not appearing to a *ſubpœna*. Poſt. 540.

Jones, 430. Cro. Eliz. 130. Ld. Raym. 1529. Str. 510. 1054. 1150. Black. Rep. 36. B. R. H. 313. 2. Bac. Ab. 295. Dougl. 558.

DEBT for ten pounds on the 5. *Eliz.* c. 9. Whereas the plaintiff having a ſuit in the common pleas againſt one *Turburlack*, in an action for words, wherein he ſhews, That he was a ſuitor to the ſaid *Anne Weſt*, the now defendant, to have married her (ſhe being a woman of a good eſtate); and that the then defendant, to defame him and deprive him of his hopes of the ſaid marriage, ſaid of the plaintiff, "He hath had a baſtard by one *A. S.*" whereby he was greatly diſparaged, and loſt the ſaid marriage. To which the then defendant pleaded not guilty: and thereupon a *niſi prius* being awarded to be tried at *Glouceſter* the one-and-twentieth of *July* following, he ſued a writ of *ſubpœna* out of the common pleas, directed to the ſaid *Anne Weſt*, to teſtify in the ſaid cauſe at the ſaid aſſiſes, before the juſtices of *niſi prius*, upon the ſaid one-and-twentieth of *July*, and that the ſeventeenth day of *July decimo quarto* CAROLI he ſhewed it to the ſaid *Anne Weſt*, the now defendant, and left a note with her of the day and place of appearance, and delivered to her twelvepence towards her expences and charges, and promiſed to her, if ſhe would come at the ſaid day and place to teſtify, &c. he would give her ſo much more *pro expenſis et oneribus ſuis* as ſhe would reaſonably require; which ſum of twelvepence ſhe accepted; and that ſhe did not come *ad teſtificandum*, although ſhe was required, whereby the action paſſed againſt him: whereupon he demanded, according to the ſtatute, ten pounds, and his further damages by the Court to be taxed. Upon *non debet* pleaded, it was found for the plaintiff.

3. Term Rep. 511.

In reciting a ſtatute, a variance of "*in aliquâ curiâ*," inſtead of "*in aliquibus curiis*," is not material. 2. Bulſt. 47. 51. 1. Com. Dig. 232. 2. Hawk. P. C. 350. Comp. 229. 474. 1. Term Rep. 237.

CHARLES JONES now moved in arreſt of judgment, FIRST, That the ſtatute is miſ-recited; for the ſtatute is, "If ſuit be commenced *in aliquibus curiis*," and he recites it "*in aliquâ curiâ*;" ſo it varies.—*Sed non allocatur*; for it is all one in intendment.

In an action for not appearing to a *ſubpœna*, it need not be averred that *the ſhilling* was ſufficient for the charges. Dougl. 558.

SECONDLY, Becauſe he doth not aver, that the ſaid twelvepence was ſufficient, otherwiſe ſhe is not to ſtir out of her doors.

BRAMPSTON,

BRAMPSTON, *Chief Juſtice*, was of that opinion, becauſe ſhe is not compellable to come upon promiſe without charges delivered. GODWIN *againſt* WEST.

JONES doubted thereof.

But BERKLEY and MYSELF held it to be good when ſhe accepted the twelvepence, and ſhe did not ſay ſhe would have more for her expences.

THIRDLY, that "*oneribus*" is no word for charges.—*Sed non allocatur*; for being joined with "*expences*," it ſhews that it was intended *pro miſis* (*a*).

(*a*) This caſe was moved again in *Eaſter* Poſt. 540.

Term, and adjudged, on a new point, for the defendant.

Hilary Term,

14. Car. I. In the King's Bench.

Sir John Bramſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

Lord Say's Caſe.

Reſolutions in the caſe of SHIP-MONEY. Poſt. 601.

ACTION of TROVER and CONVERSION of three oxen taken for three pounds five ſhillings, aſſeſſed by the ſheriff of *Lincoln* upon the plaintiff towards finding of a ſhip.

2. Ruſhw. 355. 4 So. 3. Ruſhw. App. 159. 2. Roll. Ab. 174.

Upon demurrer at the bar, HOLBOURN being ready to argue, BANKS, *Attorney General*, moved, that he might not be permitted to argue any of the matters contrary to the judgment in the exchequer-chamber betwixt the king and *Mr. Hampden*, wherein he ſaid four points were adjudged:

FIRST, That the writ was legal by the king's prerogative, or at leaſtwiſe by his regal power.

SECONDLY, That the ſheriff, by himſelf without any jury, may make the aſſeſſment.

THIRDLY, That the inland counties ought to do it at their proper charges, and to find men and victuals out of their counties for the time in the writ mentioned.

FOURTHLY, That the ſum aſſeſſed was a duty, and may be levied.

HOLBOURN offered to argue, that any one, who was not party to the former judgment given in the exchequer-chamber, may be permitted to argue againſt it.

But BRAMPSTON, JONES, and BERKLEY (the writ being allowed to be legal), ſaid, that ſuch a judgment ought to ſtand until it were reverſed in parliament, and none ought to be ſuffered to diſpute againſt it.—NOTE, That the reſolution in *Mr. Hampden's Caſe* (*a*) was adjudged to be againſt law, and repealed by the ſtatute of 17. *Car.* I. c. 14.

(*a*) Poſt. 601.

CASE 2.

Edwards *againſt* Rogers.

Trinity Term, 11. *Car.* I. *Roll*

If the uncle of an ideot who is ſeiſed of a reverſion in fee, levy a fine and die in the life-time of his nephew, the grandſon of the cognizor, on the death of the ideot without iſſue, is not bound by the fine. Poſt. 543.—Jones, 456. 460. Hob. 333. 1. Salk. 241. March. 94. 3. Com. Dig. 353. S. C. Poſt. 543. 2. Inſt. 523. 3. Co. 89. Cruiſe, 159.

TRESPASS. Upon not guilty, and a ſpecial verdict, the caſe was, Tenant for life, reverſion to *William Rogers*, an ideot, in fee. *Andrew Rogers*, his uncle, levies a fine *come ceo*, &c. with proclamation to *Robert Crompton*; and had iſſue *John*, who had iſſue *William* the defendant, and died. *William* the ideot died without iſſue. *William* the defendant enters as heir to him, *viz.* ſon and heir of *John*, ſon and heir of the ſaid *Andrew*.

The

EDWARDS *againſt* ROGERS.

The queſtion was, Whether he may claim againſt this fine of his grandfather (not claiming by the grandfather, but deriving only his pedigree from him)?

And it was argued by ROLLE, *for the plaintiff*, that forasmuch as *William Rogers* is heir to *Andrew* his grandfather, uncle to the ſaid *William* the ideot, he is eſtopped to claim againſt this fine, or to ſay *quòd partes ad finem nihil habuerunt*. And for proof thereof he relied upon the 27. *Edw.* 1. c. . of Fines, and THE YEAR-BOOKS 8. *Hen.* 4. *pl.* 9. 40. *Edw.* 3. *pl.* 9. 2. *Edw.* 3. *pl.* 10. 17. *Edw.* 3. *pl.* 54. 2. *Edw.* 3. *pl.* 6. 19. *Hen.* 8. *pl.* 7. 3. *Co.* 89. 18, *Edw.* 3. *pl.* 41. 11. *Hen.* 7. *pl.* 12. *Scovell v. Braſtock* (*a*), 3. *Co.* 50. *Sir George Brown's Caſe* (*b*), and *Saule v. Clerke* (*c*).

But it was argued by FARRER, *for the defendant*, that this fine ſhall not bar, becauſe he claims not any intereſt by or from *Andrew*, nor as heir to him, but only makes mention of him in the pedigree. And he relied upon *Hobbes's Caſe* in the exchequer, cited in *Co. Lit.* 8. a. 2. *Edw.* 3. *pl.* 6. 10. 17. *Edw.* 3. *pl.* 54. 38. *Edw.* 3. *pl.* 11. 8. *Co.* 53. *Symms's Caſe* (*d*), 36. *Edw.* 3. *title* "*View*," 30. in "*ſur cui in vitâ*," 33. *Hen.* 6. *pl.* 18. 15. *Edw.* 4. *title* "*Entry* "*Congeable*," 51. 39. *Hen.* 6. *de* "*Feffment del fits*" *en vie ſon pere*; and that here he is in *quaſi* of another title, and *puiſny* to the fine (*e*).

Ante, 156. Lat. 64. 72. Dyer, 3. a. 277.

(*e*) *Vide* the opinion of THE COURT upon this caſe, Poſt. 543.

(*a*) Ante, 435. (*b*) 5. Co. 50. (*c*) Ante, 156. (*d*) Cro. Eliz. 33.

Whyte *againſt* Hanbye.

CASE 3.

Eaſter Term, 14. *Car.* 1. *Roll* 465.

ERROR of a judgment in the common pleas, in an action of *trover* and *converſion* of goods. The writ ſuppoſeth, that ſuch a day, at *Alſton* in the county of *Suffolk*, he was poſſeſſed, &c. and loſt them; and the defendant found them, and converted them to his own uſe; and in the count he ſheweth the *trover* and *converſion* to be at *Alſton* aforeſaid.

In trover, the place of the converſion ſhall be intended the ſame as where the goods are ſtated to have been loſt, if the two averments are conjoined by a copulative. *Vide* ante, 262.

The error was aſſigned, Becauſe the place of *converſion* was not ſhewn in the writ. And now MAYNARD, *for the plaintiff* in the writ of error, argued, that the place of *converſion* ought to be ſhewn in the writ; for it being an action upon the caſe, the count otherwiſe is not good; and for that purpoſe vouched 3. *Hen.* 6. 48. *Edw.* 3. *pl.* 6.

Cro. Eliz. 78. 93. 2. Bulſt. 206. 313. 1. Roll. Rep. 132. Cro. Jac. 428.

BERKLEY and MYSELF, being only in court, held, that the writ was good enough; for the poſſeſſion ſuppoſed to be at *Alſton*, and the loſs, *trover*, and *converſion*, being all conjoined with a copulative, ſhall be intended all in one place, *viz.* at *Alſton*, eſpecially the count mentioning the *converſion* to be at *Alſton*, and the iſſue there tried, and verdict given. But BERKLEY ſaid, if the writ be vitious for this cauſe, it is not aided by the verdict; but we both agreed, that as this caſe is the writ is good. Whereupon rule was given, that judgment ſhould be affirmed, unleſs, &c.

By 16. and 17. Car. 2. c. 8. after verdict judgment ſhall not be ſtayed or reverſed for the miſtake of day, month, or year, in any declaration, &c. where the right day, month, or year, in the ſame or any preceding writ, plaint, roll, or record, is once truly alledged.

Aſcough's

Case 4.

Aſcough's Caſe.

In the Court of Wards.

A deviſe of a manor held by knight's ſervice, to be ſold by executors, and part of the produce to be applied to a charitable uſe, did not bar the king of his intereſts in the eſtate.

S.C. Jones, 428.

THIS caſe was referred by the king's command to the Juſtices of the king's bench, to certify their opinion, which was thus: One *Aſcough*, ſeiſed in fee of the manor of *D.* holden by knight's ſervice *in capite*, deviſed the ſaid manor to be ſold by his executors, part of the money to be paid to his wife, and part in divers other legacies, the reſidue to be beſtowed in charitable uſes, *viz.* for the marrying of poor maidens and relief of priſoners, &c.

THE FIRST QUESTION was, Whether this were a good deviſe to bind the king, and to bar him of his *primer ſeiſin* by the ſtatute of 43. *Eliz.* c. 4. of Charitable Uſes?—And ALL THE JUSTICES held clearly, this ſhall not bar the king for his intereſt of wardſhip, livery, or *primer ſeiſin*, becauſe general words, where the king is not named, ſhall never bind or bar him (*a*).

(*a*) But now by 12. *Car.* 2. c. 24. the tenure by knight's ſervice is aboliſhed, and all wardſhips, liveries, primer ſeiſins, &c. taken away.

A deviſe of an eſtate to a charitable uſe was void againſt the heir of the deviſor as to a third part.

THE SECOND QUESTION was, Whether ſuch a deviſe by the ſaid ſtatute be good againſt him for the whole, and ſhall bar the heir to claim a third part?—And THEY ALL RESOLVED, admitting it to be a conveyance within the ſtatute, yet it is void againſt the heir for the third part; for by the ſtatute of 32. *Hen.* 8. c. 1. and 34. *Hen.* 8. c. 5. he hath no power to diſpoſe but of two parts, ſo for the third part it is clearly void (*b*).

(*b*) But by the power given by 12. *Car.* 2. c. 24. an alteration is made in the nature of tenures, which makes the theſe ſtatutes amount to the whole of a perſon's landed property.

Qu. If a deviſe of lands to be ſold, and the produce to be applied to the marrying of poor maidens, &c. is within the 43. *Eliz.* c. 4.

THE THIRD QUESTION was, Whether this were a conveyance within the ſtatute of 43. *Eliz.* c. 4.? becauſe here is not any diſpoſition of *the land* to charitable uſes, but an appointment that the land ſhall be ſold, and *the money* divided, part to his wife (who is clearly out of the ſtatute), another part to ſatisfy divers legacies, and the reſidue, which in truth was the greateſt part, to the ſaid charitable uſes.—But as to this they all reſolved not.

Prec. Ch. 391. 2. Vern. 597. Salk. 163. Duke's Ch. Uſes, 109.

Case 5.

Gybbs *againſt* Wybourn.

Tithes are payable for young trees planted in a nurſery-ground for ſale.

S.C. 1. Roll. Ab. 637. S.C. Jones, 416. Hardres, 380. 3. Com. Dig. 95.

PROHIBITION, For that the defendant libelled in the ſpiritual court for tithes of young trees planted in a nurſery upon purpoſe to be rooted up and ſold to be planted in other pariſhes. Upon demurrer the queſtion was, Whether tithes ſhall be paid for them?

ROLLE, *for the plaintiff*, argued, that they were of the nature of the land, and tithes ſhall not be paid of them, no more than of mines of coal or ſtone digged, or for trees or wood ſpent in hedging, or fuel in the houſe, wherein huſbandry is maintained.

MAYNARD argued, that foraſmuch as he made a profit by ſuch young trees, it is reaſon tithes ſhould be paid for them when he digs them up and ſells them in another pariſh, as well as of corn, or carrot-roots, or ſuch things.

And ALL THE COURT was of this opinion; whereupon a conſultation was awarded.

Lord

Lord Mounſon and his Wife *againſt* Bourn.

CASE 6.

Vide Ante, Page 518.

THIS caſe was now argued openly at the bench by JONES and BERKLEY, *for the defendants* in the writ of error, that the judgment ought to be affirmed.

BERKLEY argued, FIRST, that there being no error aſſigned in the principal judgment, it is therefore to be affirmed. The aſſignment was "*in redditione executionis*," becauſe the *ſcire facias* in the ſaid writ was, "*ſi conſtare poterit per inquiſitionem vel alio modo*," that they had waſted the goods, "*quòd ſcire faciant eis ad reſpondendum*" to the ſaid *devaſtavit*, and ſhew cauſe wherefore execution ſhould not be awarded of their proper goods, which being a judicial writ may be well framed as the Court ſhall appoint: for as THE REGISTER is the rule for original writs whereby they are framed, which is confirmed by act of parliament, and there ought not to be any variance from them but by authority of parliament, as the ſtatute of *Weſtminſter*, c. 2. ſaith; ſo for judicial writs, they may be framed according to the diſcretion and direction of the Court: and for this cauſe theſe writs have been uſually granted in the common pleas, and frequently uſed after 9. *Hen.* 6. as appears by the ſaid Book, *fol.* 57. and therefore we ought to adjudge it to be the law in the ſame court, and not to adjudge the contrary: as in *Wiſcot's Caſe* (*a*) an ejectment was brought on a leaſe by huſband and wife; and he doth not ſhew that it was by deed, for without deed it is clear it is not a leaſe of the wife; yet becauſe it is uſual in the ſaid court to omit the mentioning of the deed, it ſhall be intended to be by deed; and the precedents of the court warrant ſuch declarations, therefore it was adjudged to be good (*b*). So in *Slade's Caſe* (*c*), it was adjudged, by reaſon of the multitude of precedents in the king's bench, that an action on the caſe may be maintainable where he might have had an action of debt, and that the common courſe had been to have debt until then, and ſome had been reverſed for this cauſe; yet being argued in the exchequer-chamber, and there made apparent by the precedents in the king's bench, that ſuch actions were allowed in the king's bench, it was adjudged, that it ought be taken for law (*d*). And ſo it had been uſed ſince in the common pleas; yet no precedents were ſhewn before the time of *Henry* the ſixth. So here the precedents and judgments in the common pleas warranting this courſe, it is to be taken now as the law of the court, and to be allowed. And to anſwer to *Petifer's Caſe* (*e*), he ſaid, there was great difference betwixt the caſes; for there the inconvenience was, becauſe the judgment was by default upon two *nihils* returned; but here they are returned "warned," and appeared, and they might have traverſed the inquiſition, and taken iſſue thereupon, *viz.* that they had not made any devaſtation. And for the caſe cited 12. *Edw.* 3. *tit.* "*Execut.*" 9. it is a harder caſe than this; for there, upon a *fieri facias*, was returned *nulla bona*; and upon a *teſtatum*, that they had goods and waſted them, the ſheriff was commanded that he ſhould inquire thereof, and if he found they had waſted, he ſhould make execution *de bonis propriis*; ſo without any other warning he was to take their proper goods in execution:

If *nulla bona* be returned to a *fieri facias de bonis teſtatoris*, and a *devaſtavit* be ſuggeſted on the roll, a writ of inquiry ſhall be directed to the ſheriff, and if by inquiſition the *devaſtavit* be found and returned, there ſhall be a *ſcire facias quare executionem non de bonis propriis*, to which, upon *ſcire feci* returned, the executor may appear and traverſe the inquiſition; but if he make default, or it be found againſt him, or two *nihils* be returned inſtead of *ſcire feci*, the judgment ſhall be *de bonis propriis*; but although he neglect to appear and traverſe the *devaſtavit* returned, he may be relieved on *audita querela*. Poſt. 564. 603. S.C. Jones, 417. 1. Roll. Ab. 933. Noy, 11. Dyer, 210. 5. Co. 32. Cro. Eliz. 859. 1. Sid. 337. 398. 1. Salk. 310. 1. Saund. 217. Carter, 2. 2 Lev. 161. 209. 1. Vent. 315. 321. Stra. 440. 1. Com. Dig. 256.

(*a*) 2. Co. 61. b.
(*b*) 4. Co. 93. a.
(*c*) Cro. Eliz. 438. 481. 656. 708. Palm. 268. Hutt. 55. 102. Cro. Jac. 563. Plowd. 431. Winch. 34. 1. Leon. 192. 204. 4. Leon. 50. Sav. 110. Dyer, 91.
(*d*) 5. Co. 88. 1. Salk. 9. 1. Mod. 163. 10. Co. 77.
(*e*) 5. Co. 32.

yet

Ld. Mounson and his Wife *against* Bourn.

yet he conceived, that in ſuch caſe, if the ſheriff had done ſo, he was not chargeable in an action upon the caſe, becauſe he did it by the Court's command; but in this caſe the Court was more favourable, to have an inquiſition before, and not immediately to make execution, but to warn the parties to ſhew cauſe wherefore he ſhould not have execution. And when they appeared, and would not anſwer, but ſuffered it to paſs by *nihil dicit*, it is *quaſi* a confeſſion thereof, and therefore good reaſon they ſhould be charged *de bonis propriis*; wherefore he concluded, that there is no error either in the judgment or execution, and that they ſhould be affirmed.

Cro. Jac. 3. 59. Dyer, 168. a.

Jones argued to the ſame purpoſe, that the cuſtom and precedents in all courts are the law in the ſame court, and conſtant judicial proceedings are to be accounted law; and therefore in the common pleas it is the uſual courſe to have but one *ſcire facias* to have execution, which being returned *nihil*, the party is to have execution. But in the king's bench the uſual courſe is to have two *ſcire facias*'; and if execution be taken upon one *ſcire facias* awarded and *nihil* returned, it is error, and therefore may be reverſed, becauſe it is contrary to the courſe of the court. And this caſe differs from the reaſons and miſchief in *Petifer's Caſe*, becauſe the return here is, that they were warned and made default, and would not plead; whereupon he concluded alſo, that the judgment and execution ſhould be affirmed.

Brampston, *Chief Juſtice*, argued the ſame way, that as this caſe is, it ſhould be affirmed; for it is no inconvenience here to the parties, or to the ſheriff, when the ſheriff takes an inquiſition which finds a *devaſtavit*, and the party is warned and appears, and demurs thereupon, ſo that he takes notice of the writ; and the common courſe and precedents of the court are the law of the court (*a*), and one court ought to take notice of the cuſtoms and courſes of other courts, as it is held 6. *Edw.* 4. *pl.* 1. 11. *Edw.* 4. *pl.* 1. and 2. *Co.* 16. *Lane's Caſe*, which is a ſtronger caſe than this; for there it is, that a leaſe under the exchequer ſeal is as well allowable and pleadable in this court as if it had been under the great ſeal (*b*). And although regularly a freehold cannot paſs but under the great ſeal, yet in regard of the uſual courſe of the exchequer, and multitude of precedents there (of which courſe the common pleas ought to take notice), and for the inconvenience whereby many ſubjects ſhould be otherwiſe prejudiced, it was adjudged good and allowable there; *à multo fortiori* here, becauſe this courſe of awarding thoſe writs hath been continued in this court ever ſince 9. *Hen.* 6. and therefore there is great reaſon they ſhould be now allowed. And for the miſchief alledged, that the party ſhould be concluded by this inqueſt of office, it was ſaid, there was not any miſchief; for it was agreed by all of us, that he may contradict it upon his appearance, and traverſe it: and when he is warned and will not anſwer, it is *quaſi* a confeſſion that it is true, and it was his fault he would not traverſe it.—And where it was ſaid, that it may be taken by default upon two *nihils* returned, and ſo he ſhould be prejudiced, I thereto anſwered, there was not any miſchief; for if it ſhould be falſe, he might have an *audita querela*, and ſo help himſelf, as *Fitz. Nat. Brev.* 104. *I.*—And ſo we concluded, that the judgment and execution ſhould be affirmed, and gave a rule to the prothonotaries, that ſuch courſe of writs ſhould be here uſed as conſonant to law and juſtice.

(*a*) Bridgman, 21. 4. Co. 93. b. 9. Co. 30. b. Hard. 340. 1. Saund. 73. 133.

(*b*) Ante, 513. 1. Leon. 170. Cro. Jac. 109. 1. Roll. 524. 2. Roll. 182. R. 180.

See the Caſe of Bellew v. Scott, Stra. 440.

Smith *againſt* Riſley and Others.

CASE 7.

Trinity Term, 14. *Car.* 1. *Roll*

EJECTMENT. Upon a ſpecial verdict the caſe was, *Paul Riſley* was ſeiſed in fee of the lands in queſtion, and by indenture betwixt him and *Sir Thomas Denton*, *Sir Alexander Denton*, *Thomas Riſley* his brother, and *William Withers*, "COVENANTED "and agreed with them, That for the favour and affection which "he did bear to his wife and children in that indenture mentioned, "and for the better maintenance, livelihood, and preferment of "them, and to the intent to ſettle the lands, tenements, and here-"ditaments hereafter mentioned in the name and blood of the ſaid "*Paul Riſley*; he did thereby COVENANT for him, his heirs and "aſſigns, to and with the ſaid four parties and their heirs, that he "the ſaid *Paul Riſley* and his heirs ſhall at all times from hence-"forth ſtand and be ſeiſed of the ſaid tenements (in the declara-"tion mentioned) to the uſe of the ſaid *Paul Riſley* for term of his "life, without impeachment of waſte; and after his deceaſe, to "the uſe of *Dorothy* his wife for term of her life; and after her "deceaſe, to the uſe of the ſaid covenantees and their heirs. "NEVERTHELESS, upon ſpecial truſt and confidence, that they "ſhall make leaſes and eſtates thereof, or of any part thereof, as "the ſaid *Paul Riſley* ſhall appoint by any his deed, &c. And in "caſe that he make not any ſuch appointment, then the ſaid co-"venantees and their heirs ſhall levy out of the rents, iſſues, and "profits thereof, for his younger children hereafter named, VIZ. "*Creſcens*, *Peter*, and *Paul*, his younger ſons, and for *Mary*, *Do-"rothy*, and *Elizabeth*, his three daughters, two hundred pounds "a-piece: the daughters portions to be paid at their reſpective "ages of twenty years, and the ſons portions at their reſpective "ages of twenty-four years; and that the ſaid covenantees and "their heirs ſhall pay, allow, and give out of the rents, iſſues, and "profits to every of the three ſons and three daughters ſuch rea-"ſonable maintenance as they ſhall appoint; and after the deceaſe "of the ſaid *Paul Riſley* and *Dorothy* his wife, and the ſaid portions "levied, then to the uſe of *Thomas Riſley*, ſecond ſon of the ſaid "*Paul Riſley* (the now defendant), and the heirs of his body; and "for want of ſuch iſſue, then to the ſaid *Creſcens* and the heirs of "his body (and ſo to his other ſons, and then to the uſe of his "daughters and the heirs of their bodies); and for want of ſuch "iſſue, to the uſe of the right heirs of the ſaid daughters for ever." The jury find, that on the fifth day of *September*, in the ſecond year of *Charles* the firſt, *Paul Riſley* died, and that *Dorothy* his wife ſurvived him, and entered, and was ſeiſed, *prout lex*, *&c.*: and that afterwards, *viz.* 12th *September*, 2. *Car.* 1. *Sir Thomas Denton* and the other three covenantees by indenture, inrolled within ſix months in the chancery, bargained and ſold to the ſaid *Thomas Riſley* the brother the ſaid tenements, HABENDUM to him and the heirs of his body, to the intent he ſhould perform the truſts in the ſaid firſt indenture mentioned, the remainder over, as is limited in the firſt indenture. They find, that *Mary*, one of the daughters, attained to the

If *A.* by indenture, made between him of the one part, and *B.* his brother and others, who were ſtrangers, in conſideration of love and affection to his wife and children, and to ſettle his land in his name and blood, covenant with them to ſtand ſeiſed to the uſe of himſelf for life, and after to his wife for life, and after to the covenantees and their heirs in truſt, to raiſe portions, &c. &c. the uſes are well raiſed by this deed to *B.* his brother, but not to the other covenantees.

S. C. Jones, 418.
S. C. 2. Roll. Abr. 783.
Plow. 305. 307.
Yelv. 51.
7. Co. 40.
Sid. 83.
Cro. Jac. 180.
Cowp. 9. 600.

SMITH *against* RISLEY, and OTHERS.

the age of twenty years in the life of the ſaid *Paul Riſley*; and that *Dorothy*, another of the daughters, attained to the age of twenty years after the death of the ſaid *Paul Riſley*, in the life of her mother; and that none of their portions were paid; and that *William Riſley* (the leſſor of the plaintiff), ſon and heir of the ſaid *Paul Riſley*, entered and made this leaſe, and the defendants ouſted him. *Et ſi ſuper totam materiam, &c.* the defendants be guilty, they pray the diſcretion, &c.

And it was argued divers times at the bar by WARD and HOLBOURN, *for the plaintiff*, and by PORTER and GRIMSTON, *for the defendants*. And it was ſaid for the plaintiff, that this deed raiſed no uſes, becauſe all the four covenantees, except *Thomas Riſley* the brother, are ſtrangers in blood to the covenantor: and that *Thomas Riſley* the brother, although he were named brother, was named for diſtinction only betwixt him and *Thomas Riſley* the ſon, and not for the conſideration of blood to raiſe a uſe to him; and the intention was to ſettle an uſe in them four, for performance of the truſts mentioned in the deed, and for ſettling the uſes in them all, or elſe in none of them: and none of the conſiderations in the deed extend to *Thomas* the brother, nor is intended for his benefit; and ſo none of them can raiſe a uſe in him. For the firſt conſideration is, for the preferment of his wife; the ſecond, for the preferment of his children; the third, to raiſe portions for the uſe and benefit of his children; and there is not any benefit or profit mentioned to the brother or his children: and if a uſe ſhould be raiſed out of the reſidue, it is upon a contingency, *viz.* after payment of the portion; and it now appears that they are not paid, nor can be paid, becauſe the one daughter came to her age of twenty years before the death of her father, the other daughter before the death of her mother.

But ALL THE COURT reſolved, that the uſes are well raiſed, and veſted in *Thomas* his brother (but not in any other of the three covenantees), becauſe he is of the blood: and one of the conſidera-
Pl. Com. 307. b. tions is, for conſideration to ſettle it in his blood, which is by the ſettling in the brother; and although it be not mentioned that it is in conſideration that he is his brother, yet being his brother it ſuf-
Co. lib. 7. 40. b. Moor, 504. ficeth: and it is likewiſe ſufficient, becauſe the brother is to take eſtate to raiſe portions to his nephews and nieces, and alſo to ſettle eſtates upon them, according to his appointment: and here is not any contingent uſe, but only a truſt and confidence in the covenantee to execute the eſtate to his children; but no eſtate is in the children by any eſtate limited unto them: then when all the other covenantees join in a bargain and ſale to *Thomas* the younger ſon, he hath a good eſtate. Whereupon by THE WHOLE COURT it was adjudged for the defendant.

Cook

Cook *againſt* Cook.

CASE 8.

Trinity Term, 14. *Car.* 1. *Roll* 1446.

ERROR of a judgment in waſte. The error aſſigned was, Because the plaintiff declares, that the defendant *fecit vaſtum* in a cloſe *in ſuccidendo* three oaks, aſhes, and ſix black-thorn trees growing, &c. The jury found the waſte *in ſuccidendo* three oaks, three aſhes, and ſix black-thorn trees, *exiſtentes arbores maeremii*; and found damages jointly for them all.

Waſte may be committed in cutting down *black-thorn*, the jury finding it to be timber.

Co. Lit. 53. Dyer, 65. Moor, 812. 2. Roll. Abr. 817. 819. Cro. Jac. 126. 1. Term Rep. 55.

MALLET moved, that it was error, for black-thorn trees cannot be timber, nor is there any waſte lies for them, unleſs they be growing in hedges, which ought to be ſpecially ſhewn; therefore the giving of entire damages was erroneous: and it is apparent, that black-thorn trees are not accounted timber, where there are other timber-trees growing in the ſame cloſe, as 46. *Edw.* 3. 9. *Hen.* 6. *pl.* 10. 65. & 67.

But THE COURT, *abſente* BERKLEY, agreed, that it is no error: for black-thorn in ſome countries may be accounted timber; and being averred in the declaration to be timber, and the iſſue found by the verdict, it is not to be doubted but that it is timber. Wherefore the judgment was affirmed.

Powel *againſt* Sheen.

CASE 9.

PROHIBITION was prayed to the council of the marches of *Wales*, For that upon a bill there for a ſuppoſed riot and battery, to the plaintiff's damage of a thouſand pounds, they proceeded and gave ſentence againſt the defendant, and awarded one hundred marks damages to the plaintiff; where by their inſtructions they ought not to hold plea of damages or debt above fifty pounds.

The courts in *Wales* cannot hold plea of damages or debt above fifty pounds.

Poſt. 558. 595.

EVERS, *the King's Attorney* for the marches of *Wales*, anſweted, that by their new inſtructions they may hold any plea of riots or miſdemeanors, as the ſtar-chamber may.

But it was thereto replied, That although the ſtar-chamber of late time hath uſed to decree damages to the party, and the legality thereof hath not been queſtioned, being a ſupreme court, it doth not therefore follow that other courts may aſſume unto themſelves ſuch a juriſdiction: and although EVERS ſaid, that court is ordained and eſtabliſhed by the act of 34. *Hen.* 8. c. 26. it was anſwered, that the ſaid act doth not authoriſe that court to do more than formerly had been uſed; and whether it were before thoſe times ſo uſed cannot be ſhewn.—Whereupon IT WAS ADJUDGED, that a prohibition ſhould be granted.

Pigot *againſt* Mary Pigot and Elizabeth Lewen.

CASE 10.

Trinity Term, 14. *Car.* 1. *Roll* .

APPEAL of the death of his father, whoſe heir he is, againſt the defendants, Becauſe that they, *videlicet*, the ſaid *Mary Pigot* PRODITORIE, and *Elizabeth Lewen* FELONICE, conſpired the death of *Roger Pigot* the plaintiff's father, and late huſband to the ſaid *Mary*; and for that purpoſe the ſaid *Mary* PRODITORIE, and the ſaid *Elizabeth* FELONICE, miniſtered to him ſuch a kind of

On an appeal of treaſon and felony by the heir againſt the wife and a ſtranger for the murder of his father, he may take out *one* in which the appellees are arraigned,

or two *venires* at his election; and if *the general iſſue* be joined at the bar the ſame time there is no neceſſity to file the declaration.

poiſon

PIGOT *against* PIGOT and LEWEN.

poiſon in a poſſet, which he, not knowing, drank up, and afterward within ſuch a time died; ſo the ſaid *Mary* PRODITORIE, and the ſaid *Elizabeth* FELONICE, him murdered and killed.

Jones, 425. 1. Roll. Ab. 536. H. P. C. 182. 2. Inſt. 320. 1. Med. 467. Co. Lit. 288. 1. Com. Dig. 365. 369. 372. 4. Com. Dig. 16, 17. 1. Bac. Ab. 124. 2. Hawk. P. C. 243. 301.

They being hereupon arraigned in the king's bench, pleaded not guilty: and a *venire facias* was awarded to try them at the bar in *Michaelmas Term*, 14. *Car.* I.; and after evidence apparent againſt the ſaid *Mary*, and doubtful againſt the ſaid *Elizabeth*, the jury found the ſaid *Mary* GUILTY, and the ſaid *Elizabeth* NOT GUILTY.

CHARLES JONES, *for the defendant*, now moved in arreſt of judgment, that there was not any declaration upon the file in the ſaid *Michaelmas Term*, as it ought to be.

But MAYNARD, *for the plaintiff*, ſaid, that this appeal was arraigned at the bar in *Trinity Term*, 14. *Car.* I. and the defendants being at the bar, inſtantly pleaded thereto the ſame Term; and ſo it is well enough without other declaration filed, which is the uſual courſe in this court; and that no other declaration is to be filed: but if they had not pleaded the ſame Term, or if they had pleaded any other plea than "*not guilty*," ſo as there had been adjournment to another Term, then the declaration ought to have been filed.—ALL THE COURT were of that opinion.

HODDESDEN, *the Secondary*, ſaid, that the uſual courſe was ſo.

An appeal of death may be againſt one for petty treaſon, and another for murder, in the ſame court. 1. Com. Dig. 366. 368. Fetter, 323.

A SECOND EXCEPTION was taken, Becauſe there was but one *venire facias*, where there ought to have been ſeveral *venire facias*' in the appeal; ſo they are ſeveral offenders, eſpecially the one being charged with *treaſon*, the other with *felony*: and for that purpoſe vouched the *Old Bk. of Ent.* 46, & 47. and *New Bk. of Ent.* 57.

MAYNARD, *for the plaintiff*, thereto anſwered, that the plaintiff might take one *venire facias*, or ſeveral *venire facias*' for doubt of challenge; and ſo is 9. *Edw.* 4. *pl.* 27.

ALL THE COURT were of this opinion. Whereupon it was adjudged for the plaintiff; and judgment was given, that the ſaid *Mary* ſhould be burnt to death (*a*).

(*a*) See 30. Geo. 3. c. 48. by which this judgment is abolished.

CASE 11.

James *againſt* Tutney.

Cujus Principium Ante, Page 497.

In *replevin* of a diſtreſs taken for a penalty under a bye-law, if the defendant make conuſance as bailiff of the lord of the manor, and the verdict be found for him, he ſhall have his coſts. Ante, 524. S. C. Jones, 422. 434. Cro. Eliz. 300. 329. Moor, 893. Cro. Jac. 520.

THIS Caſe was now argued at the bench by BERKLEY, *Juſtice*, MYSELF, and JONES, *Juſtice*.

The ſole queſtion was, Whether, as this caſe is, damages and coſts ought to be given to him who juſtifies this diſtreſs as bailiff, being adjudged for him; or, whether the giving of damages and coſts be erroneous?

BERKLEY argued, *for the defendant* in error, that the damages and coſts were well given, and no error; for by the 7. *Hen.* 8. c. 4. it is expreſſed, "That every avowant, and every "other perſon or perſons that make avowry, conuſance, or juſti- "fication as bailiff in a *replevin* or ſecond deliverance, for any "rent, cuſtom, or ſervice, if their avowry, conuſance, or juſtifica- "tion be found for them, or the plaintiff barred, ſhall recover "coſts and damages, as the party ſhould have done if they had re-

2. Roll. Rep. 75. Dougl. 709. note (2) r 2. Term Rep. 235.

"covered."

" covered." And he conceived, that by the expreſs words of the ſtatute he ought to have his damages and coſts; for he is within the word " cuſtoms;" for he diſtrained for a duty demanded, grounded upon a cuſtom; and if not, yet eſpecially he is within the intent and equity of the ſtatute: for in ſtatutes, although particulars be enumerated, yet it excludes not, but that whatſoever is within the ſame reaſon and equity ſhall be taken to be within the ſtatute. As the ſtatute of *Weſtminſter* 2. *de donis conditionalibus* expreſſed divers kinds, yet other gifts not mentioned are within the ſaid ſtatute; ſo the ſtatute 27. *Hen.* 8. c. 10. of jointures, enumerates divers particular eſtates which are jointures; yet in *Vernon's Caſe* (*a*), other eſtates within the ſame reaſon are within the ſtatute: alſo in the expoſition of ſtatutes, when the words make proviſion for certain perſons, yet they ſhall be extended by equity to others; as the ſtatute of Bigamy, and the ſtatute of 23. *Hen.* 8. c. 15. of Coſts, which are expounded larger than the words: ſo *Partridge's Caſe* (*b*), leaſe for years, is within the ſtatute of Champerty; and the YEAR-BOOK 19. *Hen.* 8. *pl.* 11. is expreſs, that the defendant ſhall recover damages upon demurrers, yet it is out of the words: and here as this caſe is, a diſtreſs being for a cuſtomary duty, he conceived, that damages and coſts are recoverable, as well by the 7. *Hen.* 8. c. 4. as by the 21. *Hen.* 8. c. 9. which adds, " That the avowant for *damage feſant* ſhall have coſts." But he held, that if the lord avow for relief, or *pro valore maritagii*, as he may, yet that is out of the ſtatute; for they are not ſervices and cuſtoms, but flowers or fruits fallen from them, and therefore they are out of the ſtatute: and he cited for this 26. *Hen.* 8. *pl.* 8.; and an avowry for an amercement in a leet is out of the ſtatute, becauſe it is not grounded upon cuſtom: and for proof thereof he cited *Grey's Caſe* (*c*), and *Greiſley's Caſe* (*d*). Whereupon he concluded, that judgment ſhould be affirmed.

JAMES *againſt* TUTNEY.

Carth. 179. Ld. Ray. 788. 2. Com. Dig. 548.

Co. Lit. Sect. 21.

3. Com. Dig. 115.

The ſame day *I* argued the ſame way; for this being a general ſtatute, ought to be taken liberally to remedy the general miſchief, which was at the common law, that the avowant diſtraining juſtly, ſhould be at the charge to defend his act in diſtraining, and ſhould not be allowed coſts nor damages, to the encouragement of thoſe who tortiouſly denied their duties, ſuing out replevins merely for vexation ſake, and in diſcouragement of thoſe who diſtrained, who by the common law had neither coſts nor damages allowed them for their lawful diſtreſſes; wherefore to remedy this miſchief were the ſtatutes of 7. *Hen.* 8. c. 4. and of 21. *Hen.* 8. c. 19. made, which ought liberally to be conſtrued for advancing the remedy, and ſuppreſſing the miſchief, as in *Heydon's Caſe* (*e*). And it ſhall be conſtrued according to the intent of the makers, which intended by 7. *Hen.* 8. c. 4. to give coſts to the defendant where he prevailed, as the plaintiff ſhould have had, if he had recovered: and although they mention rents, cuſtoms, and ſervices only, and the preamble extends only to thoſe rents, cuſtoms, and ſervices which lie in tenure, yet the ſecond part, whereupon this opinion is grounded, is not ſuch rents, &c. referring to the preamble, but

11. Co. 73. b.

(*a*) 4. Co. 1, 2. a.
(*b*) Plowd.
(*c*) 5. Co. 78.
(*d*) 8. Co. 38. 41. a.
(*e*) 3. Co. 7.

JAMYS against TUTNEY.

all rents, cuſtoms, and ſervices; ſo all manner of cuſtoms and ſervices are within the intent of the ſtatute. And *I* conceived the caſes concerning diſtreſſes for relief, *valore maritagii*, and for amercements in leets, to be likewiſe within the ſervices of 7. *Hen.* 8. c. 4. and 21. *Hen.* 8. c. 9. becauſe they are in nature of ſervices, and to be expounded as diſtreſs for cuſtoms and ſervices; and therefore in the caſe of *Shepward v. Mackworth* (*a*), where the bailiff of *Lord Berkley* diſtrained for relief, and the queſtion was, Becauſe the land had been in ward to the queen by reaſon of other lands held of her majeſty by ſervice *in capite*, whether the heir ſhould pay relief to other lands at his full age? it was adjudged, that he ſhould; there damages were given by the jury to the avowant: and although POPHAM adviſed, becauſe it was a new caſe, that the avowant ſhould take his judgment for the relief, and releaſe the damages, which he did, yet that doth not prove that no damages were due, but that it was doubted only; and there is not any reſolution nor opinion to the contrary in that caſe (*b*). And all the precedents are, that damages and coſts have been allowed to avowants in ſuch caſes; and therefore I concluded, that judgment ſhould be affirmed.

Ante, 533.

8. Cro. 28.

JONES, *Juſtice*, argued to the contrary, and ſaid, We are here upon the expoſition of the ſtatutes; and multitude of precedents will not ſerve for the expoſition of the ſtatutes, unleſs after debate in court they be mentioned to have been ſo adjudged; but no ſuch precedent hath been ſhewn, but a multitude which have paſſed *ſub ſilentio* without debate. And for the matter he held, that it was out of the words and intent of the ſtatute; for the firſt part of the ſtatute is, "Where a diſtreſs is for rents, cuſtoms, or ſervices in lands, &c. that the avowry ſhall be upon the land;" ſo that extends only to ſuch rents, cuſtoms, and ſervices by which the land is held: and the ſecond part of the ſtatute of 21. *Hen.* 8. c. 9. which is *quaſi* an expoſition of the former, is, "In ſuch "avowry for any rents, cuſtoms, and ſervices," thoſe words are to be applied to former rents, cuſtoms, and ſervices; and although the words be general, and ſay not "ſuch rents, cuſtoms, and ſervices," yet it is to be applied to the former. And where the ſtatute 21. *Hen.* 8. c. 19. intends further remedy than was before, it is by expreſs words, "upon diſtreſſes for *damage feſant* and other "rents," which extend to rent-charges, but no mention of diſtreſſes or avowry for any other cauſe. And in *The Marquis of Winchester's Caſe* (*c*), a caſe is cited upon the ſtatute of 9. *Rich.* 2. c. 3. of a writ of error, where, upon a recovery againſt tenant for life, it was held, it ſhould not extend to other eſtates; and the ſtatute of 4. *Jac.* 1. c. 3. which ſays, that "no coſts ſhall be given in "other cauſes than ſuch as are within the ſtatute of 23. *Hen.* 8. "c. 15," ſhews, that without an act of parliament coſts ſhall not be given in other cauſes: and for the caſe cited here in an avowry for a relief damages were given, and for doubt of error releaſed by the avowant, it doth appear of record that they were releaſed; therefore it ſhall be intended they were diſallowed by directions of

2. Cro. 330.

(*a*) Cro. Jac. 28.
(*b*) See Co. Ent. 570. 573. Greſley's Caſe, 8. Co. 38.
(*c*) 3. Co. 1.

the

the Court: and for the caſes of damages and coſts given in avowry for amercement in leets, he knew, that in the 35. *Eliz.* in an avowry for an amercement in leet, damages and coſts being given, judgment was reverſed for that cauſe in this court. Therefore he concluded, that judgment ſhould be reverſed.

JAMES *againſt* TUTNEY.

NOTE, In his argument he ſaid, that in *Lord Say's Caſe* (*a*) it was adjudged, that *ſcandalum magnatum* was out of the ſtatute of 21. *Jac.* L. c. 16. of Limitation of Actions upon the Caſe, and out of the ſtatute of 27. *Eliz.* c. 8. of Errors in the Exchequer Chamber, becauſe not mentioned, although it be included in the words, "Actions upon the caſe."

Neither the ſtatute of 21. *Jac.* 1. c. 16. nor the 27. *Eliz.* c. 8. extends to actions of *ſcandal. magnatum.*

1. Sid. 143. 3. Mod. 41. 2. Show. 506.

(*a*) Ante, 140.

15. Car. I. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Memorandum.

CASE 1.

Serjeant Reve promoted to the common pleas on the death of *Mr. Juſtice Hutton.*

UPON *Saturday* the 4th of *May* 1639, *anno* 15. *Caroli regis*, SERJEANT REVE, of the county of *Norfolk*, was ſworn one of the Juſtices of the common pleas, ſucceeding SIR RICHARD HUTTON, late ſecond Juſtice of the ſaid court, who died at *Serjeants-Inn*, in *Chancery-lane*: he was a grave, learned, pious, and prudent Judge, and of great courage and patience in all his proceedings.

Cook's Caſe.

CASE 2.

To kill a ſheriff's officer voluntarily while he is attempting to break into a houſe for the purpoſe of executing civil proceſs, is *manſlaughter*, and not *murder*; for it is not lawful to break open doors for ſuch purpoſe, and every man has a right to defend his own houſe. Ante, 372.

COOK was indicted for the murder of *Marſhal*. Upon his arraignment, he pleaded not guilty; and it was found, that the ſaid *Marſhal* was a bailiff to the ſheriff of *Somerſet*, and had ſeveral warrants upon ſeveral *capias ad ſatisfaciendum* againſt the ſaid *Cook* and his father, directed to him and other bailiffs; and that they, by virtue or colour thereof, entered into the ſaid *Cook*'s ſtable and out-houſe, and hid themſelves there all night; and at eight of the clock the next morning came to *Cook*'s dwelling-houſe, and called him to open his doors and ſuffer them to enter, becauſe they had ſuch warrants upon ſuch writs, at the ſuit of ſuch perſons, to arreſt him, and willed him to obey them. But the ſaid *Cook* commanded them to depart, telling them, they ſhould not enter. And thereupon they brake a window, and afterwards came to the door of the ſaid houſe, and offered to force that open, and brake one of the hinges thereof. Whereupon the ſaid *Cook* diſcharged his muſquet at the ſaid *Marſhal*, and ſtroke him, of which ſtroke the day following he died. The doubt was, Whether upon all this matter he be guilty of murder or of manſlaughter?

W. Jones, 429. Sum. 46. 1. Hale. 42. 458. 2. Hale, 117. 470. 5. Co. 93. 6. Mod. 173. Ld. Ray. 1028. Foſter, 311. 319. 10. St. Tr. 462, 4. Bl. Com. 27.

And it was now argued by ROLLE, *for Cook*, that it was not murder; for although a bailiff were ſlain, yet it was by his own procurement in doing an unlawful act, *viz.* in breaking the window and door, and attempting to enter and ſerve proceſs, which is not lawful for a perſonal duty, unleſs in the king's caſe; and for that purpoſe he cited 5, *Co.* 91. *b.* 92. *Seamain's Caſe.* 13. *Edw.* 4. Cowper, 3. 1. Hawk. P. C. 108. 130. 2. Hawk. P. C. ch. 14.

Cook's Case.

And after argument at the bar, ALL THE JUSTICES *seriatim* delivered their opinions, that it was not murder, but manslaughter only; for though he killed a bailiff, yet he killed him not in duly executing process: for it is not murder, unless there be *malitia præcogituta*, or *malitia implicita*; as to murder one suddenly, or in resistance of an officer doing his office; but that last ought to be where he is duly executing his office, by serving the process of law, wherein he is assisted *cum potestate regis et legis*: but here this bailiff was slain in doing an unlawful act, in seeking to break open the house to execute process for a subject, which he ought not to do by the law: and although he might have entered if the door had been open and arrested the party, and it had been lawful, yet he ought not to break open the house, for that is not warranted by law (*a*); and especially lying there in the night, and in the morning breaking the window and offering to force the door, which is not sufferable; for under colour thereof one may enter who hath not any such authority; and every one is to defend his own house. Yet THEY ALL HELD, that it was manslaughter: for he might have resisted him without killing him; and when he saw him and shot voluntarily at him, it was manslaughter.

2. Cro. 280. Ante, 183.

(*a*) 5. Co. 92. b. Cro. Jac. 486. Cro. Eliz. 909. Moor, 668. Yelv. 28. March. 4. Jones, 430. Bulst. 46. Dalt. 350. Hob. 62. 263.

Foster, 319. Lofft, 374. Cowper, 2. 3. Bac. Ab. 746.

If a man, intending to kill a thief or a house breaker in his own house, happens by mistake to kill one of his own family, it cannot be imputed to him as a criminal action.

But JONES said, that it was resolved by the Chief Justice and himself, and the Recorder of *London*, at the last sessions at *Newgate*, in the case of one *William Levett*, who was indicted of the homicide of a woman called *Frances Freeman*, where it was found by special verdict, that the said *Levett* and his wife being in the night in bed and asleep, one *Martha Stapleton*, their servant, having procured the said *Frances Freeman* to help her about house-business, about twelve of the clock at night going to the doors to let out the said *Frances Freeman*, conceived she heard thieves at the door offering to break them open; whereupon she, in fear, ran to her master and mistress, and informed them she was in doubt that thieves were breaking open the house-door. Upon that he arose suddenly and fetched a drawn rapier. And the said *Martha Stapleton*, left her master and mistress should see the said *Frances Freeman*, hid her in the buttery. And the said *Levett* and *Hellen* his wife coming down, he with his sword searched the entry for the thieves: and she, the said *Helen*, espying in the buttery the said *Frances Freeman*, whom she knew not, conceiving she had been a thief, crying to her husband in great fear, said to him, "Here they be "that would undo us." Thereupon the said *William Levett*, not knowing the said *Frances* to be there in the buttery, hastily entered therein with his drawn rapier, and being in the dark and thrusting with his rapier before him, thrust the said *Frances* under the left breast, giving to her a mortal wound, whereof she instantly died: and whether it were manslaughter, they prayed the discretion of the Court.—And IT WAS RESOLVED, that it was not; for he did it ignorantly without intention of hurt to the said *Frances*: and it was there so resolved

March. 5. W. Jones, 429. Plowd. 343. 4. Bl. Com. 27. Kely. 136. 1. Hale, P. C. 39. 1. Hawk. P. C. 110. 117.

(*a*) But to execute a *capias utlagatum*, the house of the outlaw, it is said, may be broke open. 2. Hale, 202. 9. Co. 91. Bulst. 146. Moor, 606. 4. Leon, 41. 3. Bac. Ab. 746.

But

But here they held clearly, that it is manslaughter, because he, seeing and knowing him, shot at him voluntarily and slew him. Whereupon they all resolved, it was not murder, but homicide only. *Vide* 13. *Edw.* 4. *pl.* 9. 18. *Edw.* 4. *pl.* 4. Cook's Case.

Perkinson *against* Gilford and Others. Case 3.

Hilary Term, 14. *Car.* 1. *Roll* .

DEBT against *Gilford* and others, executors of *William Collier*, *esq.* late sheriff of the county of *Dorset*, for two-and-twenty pounds ten shillings. Whereas the plaintiff had recovered in the common pleas against the executor of *William Pawlett* a debt of one hundred pounds, and two-and-twenty pounds ten shillings for damages, the debt and damages *de bonis testatoris, si, &c.*; *et si non*, the said two-and-twenty pounds ten shillings *de bonis propriis*: and the record being removed into this court, the plaintiff had a *fieri facias* directed to the said *William Collier*, sheriff of *Dorset*, for the levying of the said two-and-twenty pounds ten shillings damages of the goods of the said executor: and by virtue thereof he levied the said two-and-twenty pounds ten shillings, and afterwards died without paying, &c.: whereupon he demanded it of the said executors, and they had not paid it, *per quod actio accrevit*. The defendants pleaded *non debet*; and found against them.

Ante, 177. S.C. March. 13. Jones, 430. 1. Roll. Ab. 598. 921. Cro. Eliz. 566. Lut. 588. 1. Burr. 27.

MALLET moved in arrest of judgment,

FIRST, Because the recovery of the said debt of 122l. 10s. is in the common pleas, and the execution by *fieri facias* is in the king's bench, and he doth not shew how he came out of the common pleas into this court to have execution.—*Sed non allocatur*: for in the record it is mentioned that it is here duly, which shall be intended to be by a writ of error, or other due means: and it is not necessary to shew all the circumstances how it came hither.

In debt for money levied under a *fi. fa.* in *B. R.* on a judgment in *C. B.* it is sufficient to alledge that the record was *duly* removed.

S. C. March. 13. S. C. Jones, 430. 2. Mod. 71. Lutw. 120.

THE SECOND OBJECTION, Because it doth not appear that upon the *fieri facias* awarded it was ever returned served here, so as there is no record to charge him; for if there were any record appearing that he had levied it, then peradventure he might charge the sheriff.

THE THIRD OBJECTION, Because he chargeth him in action of debt, whereas there was never any such action brought before; but (if it had appeared by the record that the money was levied) he might have had accompt, or action upon the case, or a *scire facias*, but never an action of debt.

Debt lies on a judgment recovered.

Hob. 206. Noy, 22. 2. Saund. 343.

THE FOURTH OBJECTION, That although the action lies against the sheriff himself, yet it lies not against his executors; for the non-payment is a personal wrong, wherewith his executors are not chargeable, as debt upon an escape lies not against a sheriff's executors.

Debt lies against the executors of a sheriff for the non-payment of money levied on a *fieri facias*.

But BERKLEY, JONES, and MYSELF (BRAMPSTON *being absent*) agreed, that the action well lies: for to the second and third objections the *fieri facias* being duly executed, and the money levied by the sheriff, the executor of *Pawlett* the defendant in the first action is discharged, and may aver and plead it against any new execution to be awarded against him, as 21. *Hen.* 8. *fol.* . proves; and the

Moor, 468. 9. Co. 50. Savil. 40.

 sheriff

PERKINSON *againſt* GILFORD, and OTHERS.

Cro. Jac. 515. Hob. 206. Dyer, 22. 1. Roll. Ab. 598. 2. Roll. Ab. 410.

ſheriff is chargeable for the money to him who recovered it: and as it is allowed that he might be chargeable in accompt, as MALLET ſaid, ſo it is agreed he may be chargeable in debt; for the plaintiff might have either debt or accompt, as appears in 28. *Hen.* 8. and 4. *Co.* 94. *a. Slade's Caſe.* And as, BERKLEY ſaid, the caſe is in THE YEAR-BOOK 1. *Hen.* 7. that a collector by acceptance of a talley is chargeable in debt, ſo the ſheriff, having levied the money, is chargeable for ſo much in debt to him who recovered. And MALLET confeſſed, that in the common pleas it was adjudged, where the ſheriff returned a *fieri feci*, debt lieth againſt him. And BERKLEY ſaid, it was all one when he receives the money, for he is then liable, although he returns not the writ; for his not returning ſhall not aid nor excuſe him. And for the fourth objection they held, that the ſheriff's executors are as well chargeable as himſelf: for, as JONES ſaid, there is a diverſity where the ſheriff is chargeable in his life for a perſonal tort or misfeaſance; there his perſon is only chargeable, and there *actio moritur cum perſonâ:* but where he is chargeable for levying of money, and not paying it over, that is for a duty; and there, if he dies, his executors are chargeable as well as himſelf; which is the reaſon, that for an eſcape by the ſheriff his executors are not chargeable: but there would be great miſchief if the ſheriff's executors ſhould not be alive in this caſe; for the plaintiff had a duty due to him from the executors of *Pawlett* the firſt defendant, who paid it to the ſheriff, and thereby was diſcharged thereof: and if the plaintiff ſhould not recover it againſt the ſheriff's executors, he ſhould be without remedy, which the law will not ſuffer (*a*).—Wherefore they all agreed, that the action well lay. And rule was given to have judgment entered, unleſs, &c.

9. Co. 50. Palm. 330. Pop. 31. Raym. 57. 71. Savil. 46.

(*a*) See the caſe of Hambly v. Trott, Cowp. 372.

CASE 4.

Goodwin *againſt* Anne Weſt.

Ante, Page 522.

On 5. *Eliz.* c. 9. for not appearing on a *ſubpœna*, a note left of the cauſe, place, and day, with a *ſhilling*, if accepted, is neceſſary to ſupport the action; but if the plaintiff was not grieved by the non-appearance of the witneſs, he cannot recover.

THIS Caſe was now moved again by CHARLES JONES in arreſt of judgment, that the declaration was not good: FIRST, Becauſe he doth not ſhew, that he left the writ with the defendant: for the ſtatute is, "If they be ſerved with proceſs;" and it is not ſerving of proceſs when the writ is not left, although it be read unto the party, and a note left of the cauſe, place, and day.—*Sed non allocatur:* for JONES, BERKLEY, and MYSELF held it to be a ſufficient ſerving of the proceſs within the intent of the ſtatute, and according to the uſual courſe and practice; for there may be two, three, or four names of witneſſes in one writ (and ſo there be uſually), and he cannot leave the writ with every one of them, and it would be very chargeable unto the ſubject to have ſeveral writs for every witneſs.

Jones, 430. March. 18. 5. Mod. 355. 2. Bac. Abr. 294. Dougl. 558.

A witneſs who is ſerved with a *ſubpœna* and *a ſhilling* is bound to attend. B. R. H. 313. Black. 36. Strange, 510. 1150. 2. Ld. Raym. 1529. 2. Hawk. P. C. 610.

THE SECOND EXCEPTION, Becauſe he ſheweth that he paid to her twelvepence for her pains, and promiſed to pay to her as much more as ſhe would require, when ſhe came to be a witneſs at *Gloucester*, which is not ſufficient, according to the ſtatute: for the ſtatute is, that "he ſhall pay ſufficient charges for her travel, according to "the diſtance of the place, and the quality of the perſon ſo to be

"paid;"

" paid;" and the witneſs is not bound to accept his promiſe for the reſidue.—*Sed non allocatur:* for when it is alledged that he paid to her twelvepence, and promiſed to pay the reſidue when ſhe came to *Glouceſter*, and ſhe accepted thereof, ſhe is then bound to come, for ſhe hath accepted of his promiſe for the reſidue; otherwiſe ſhe might have refuſed, and not told him ſhe would accept of his promiſe.

Goodwin *againſt* West.

THE THIRD EXCEPTION, Becauſe the plaintiff doth not ſhew, that he is endamaged by her non-appearance, *viz.* that the verdict paſſed againſt him, or that he was inforced to be non-ſuited, or any other grievance; for ſo is the ſtatute, that " the party grieved " ſhall have his part of the ten pounds, and his further damages " taxed by the Juſtices before whom, &c." But GRIMSTON, *for the plaintiff*, anſwered, that the action being brought only for the ten pounds, and not for further damages, it is well enough; and the ten pounds is due for her non-appearance to the king and the party.—But ALL THE JUSTICES held, that the declaration was ill for this cauſe; for there ought to be a party grieved by the non-appearance, otherwiſe there is no cauſe of forfeiture: and ſo is the expreſs ſcope and words of the ſtatute. Wherefore it was adjudged for the defendant, *abſente* BRAMPSTON.

In an action on the 5. *Eliz.* c. 9. againſt a witneſs for non-attendance, the plaintiff muſt ſhew a damage for the want of the witneſs's teſtimony. Ante, 522. Jones, 431.

Bradſey *againſt* Clyſton.

CASE 5.

DEBT upon an obligation of one hundred pounds for not performing of an arbitrament, where the award was, That the defendant ſhould acquit and diſcharge the plaintiff concerning a bond of one hundred pounds, wherein the plaintiff and defendant were jointly bound for the payment of fifty pounds to *J. S.* The defendant demurred.

An award that *the defendant* ſhall acquit and diſcharge *the plaintiff* of and from a bond in which others were *jointly bound* to a ſtranger is good. March. 18. Jones, 431. 1. Ro. 248. L. Raym. 114. 247.

ROLLE now ſhewed for cauſe, that the arbitrament was void, to award that he would acquit and diſcharge him of a bond made to a ſtranger; for it is not in his power to procure a diſcharge (*a*).

But THE COURT held, that the party may well acquit and diſcharge, &c. if the fifty pounds be payable at a future day, as it is here to be intended it was.

1. Mod. 9. 3. Mod. 331. 2. Keb. 546. Lutw. 524. Carth. 378. 1. Bac. Ab. Awards, 105. 146. Kyd on

A SECOND EXCEPTION was taken, Becauſe the ſubmiſſion is, to ſtand to the award, "*ſo as* it be made under hand and ſeal, ready to be delivered to the parties:" and he ſaith, that they made the arbitrament before the day (*viz.* ſuch a day) under their hands and ſeals; and he doth not ſay " ready to be delivered."

Under a ſubmiſſion *ſo as* the award be ready to be delivered on ſuch a day, a declaration on an award made before the day, without ſaying it was ready to be delivered, is good. Jones, 341. Ld. Ray. 247.

But ALL THE COURT held, it was well enough, for the words are not " and to deliver," but " ready to be delivered;" and when it is under hand and ſeal, it is intended " ready to be delivered:" and the declaration being read, it was expreſly that it was " ready to be delivered." Whereupon it was adjudged for the plaintiff.

March. 18. Hard. 399. 3. Mod. 331. Carth. 378. Lutw. 524.

(*a*) *Vide* 4. Ann. c. 16. ſ. 12.

Daly

Case 6.

Daly *against* Bellamy and Others.

A defendant shall not have costs on an attaint brought by a plaintiff, although the verdict is affirmed.

S.C. March. 24. S.C. Jones, 432. 2. Com. Dig. 553.

ATTAINT brought by the plaintiff in trespass of battery. The verdict was affirmed.

MAYNARD now moved, *for the defendant*, upon the statutes of 21. *Hen.* 8. c. 9. and 23. *Hen.* 8. c. 15. that the defendant should have costs; because the plaintiff, if he had avoided the verdict by *attaint*, should have had costs.

But ALL THE COURT agreed (*absente* BRAMPSTON), that he should have no more costs: for if the first verdict had passed for the plaintiff, whereby he should have had costs, or if the said verdict having passed against him, thereupon he had brought this *attaint*, and the jurors had been attainted, he should have had such costs as he should have had in the first action, if it had been found for him; but he should not have had more costs in respect of the attaint: so *è converso*, where the first verdict passed for the defendant, and he had costs, if the verdict be impeached by attaint, or be affirmed, he shall have no more costs, but only those which were given upon the first verdict. And HODDESDEN said, the practice of the Court was always so.

Case 7.

Daniel *against* Count de Hertford.

Trinity Term, 14. *Car.* 1. *Roll* 543.

Qu. If in trespass, a justification that the prior of *D.* was seised in fee of the pasturage in the place *where*, for all his sheep *levant et couchant* at all times of the year, is good, without shewing either a grant or prescription.

Co. Lit. 122. 4. Co. 37. 97. 1. Mod. 74. 2. Bac. Ab. 309.

ERROR of a judgment in the common pleas in trespass, for depasturing his close with sheep. The defendant justifies, Because the prior of *D.* was seised in fee of such a great close in *D.* and was seised in fee of the pasturage in the place aforesaid, for all his sheep *levant et couchant* in the said great close at all times of the year. The plaintiff thereupon demurred; and it was there adjudged for the defendant. MAYNARD, *for the plaintiff* in the writ of error, now assigns for error the point of the judgment: FIRST, Because the defendant entitles the prior neither by prescription nor grant: and this being a profit *a prendre*, *in alieno solo*, none can entitle himself by the course of the common law thereunto without grant or prescription; and this pasturage claimed, is but as common in its nature. SECONDLY, That this plea is not aided by the statute of 31. *Hen.* 8. c. . for that gives nothing to the king but what the prior lawfully had; and therefore it ought to be shewn how the prior was entitled thereto.

ROLLE, *for the defendant* in the writ of error, said, that the plea is good; and was so adjudged upon demurrer in the common pleas; and that it was a good plea, although it were pleaded at the common law before the statute: for this pasturage claimed for sheep *levant et couchant* upon the defendant's land is common appendant, and cannot be severed from the soil by grant; and then to make prescription thereto is not good, as it is 4. *Hen.* 6. *pl.* 13. and 8. *Edw.* 4.: and if it were not good at the common law, yet the statute aids it, by pleading that the prior was seised thereof in fee at the day of the dissolution; otherwise it would be very mischievous, the priors and other religious persons at the time of their dissolution seeking to deface and suppress all their deeds, and to conceal

ceal their lands and eſtates which they then held; and therefore ſuch general averments had been allowed, as it is held in the caſe of the *Archbiſhop of Canterbury* (*a*), and in the caſe of the *Abbot of Strata Marcella* (*b*). DANIEL *againſt* COUNT DE HERTFORD.

THE COURT inclined to that opinion; but becauſe it was depending upon demurrer in the common pleas, they would not haſtily proceed. Wherefore day was given until the next Term. 2. Co. 48. b. Cro. Jac. 453.

(*a*) 2. Co. 48. (*b*) 9. Co. 24.

The Caſe of Edwards and Rogers. CASE 8.

Ante, Page 254.

THIS Caſe was now argued by MAYNARD *for the plaintiff*, and by FARRER *for the defendant*. And BERKLEY and MYSELF delivered our opinions, that this fine by *Andrew*, the uncle of *William* the ideot, who was ſeiſed of the inheritance (he dying in the life of *William*, ſo as nothing ever attached in him), ſhall never bar *William* the defendant, who was grandchild of the ſaid *Andrew*, becauſe he claims nothing by or from him, but only from *William* the nephew of *Andrew*, who ſurvived the ſaid *Andrew*: and he makes his title as heir to the ſaid *William* the nephew who was laſt ſeiſed, not making therein any mention of *Andrew*, as of one from whom he claims, but only as drawing his diſcent from him by way of pedigree, and not by way of title: and therefore it was compared to *Hobbes' Caſe*, *Co. Lit.* 8. a. where the father is attainted of felony, having iſſue two ſons, and the one of them purchaſeth lands, and dies without iſſue, it ſhall not bar the other ſon to claim as heir to his brother; and the corruption of blood in the father ſhall not hurt him (*a*).

A grandfather levies a fine of the land of *B.* His ſon, being heir alſo to *B.* may plead *quod partes finis nihil habuerunt*, though he derives his pedigree from his grandfather. *Vide* ante, 524.

(*a*) 4. Leon. 5. Palmer, 19.

Noy, 158. 2. Roll. Rep. 93. Lit. Rep. 38. 2. Sid. 25. 27. Cro. Jac. 539. Vent. 418. 425.

BERKLEY compared it to the caſe in 10. *Eliz. Dyer*, 274. where there were two brothers: the eldeſt hath good cauſe *del petition de droit*; the youngeſt ſon hath iſſue a ſon, and is attainted of felony, and is executed. The eldeſt ſon dies without iſſue; the iſſue of the younger ſon is barred of the petition, becauſe his blood is corrupt, and he cannot claim but by mentioning his father, and from him, &c. But here foraſmuch as he doth not claim nor derive by him who levied the fine, we held, he ſhould not be barred by the fine.

2. Bac. Ab. 585. 3. Com. Dig. 353. 2. Hawk. P. C. 648.

But JONES conceived, that in regard *Andrew* is bound, and cannot claim againſt that fine, and his grandchild cannot claim, but he ought to make mention of him, that he is alſo barred; and as his grandfather, if he had ſurvived, had been barred, ſo alſo ſhall his grandchild, who of neceſſity ought to mention him. Whereupon it was adjourned.

Cruiſe on Fines, 159.

Cooper's

Case 9.

Cooper's Case.

A master, lodger, or sojourner in a house, who kills a person breaking into it with intent to commit burglary or homicide, are exempt from guilt by 24. *Hen.* 8. c. 5.

Puff. l. 2. c. 5. Bracton, 155. 2. Hale, 487. 5. Co. 93. a. 1. And. 41. Kely. 51. 26. Ass. 23. Vent. 159. Raym. 212. Prin. P. L. 212. 4. Bl. Com. 180. 1. Hale P. C. 487. 1. Hawk. P. C. 108.

COOPER being indicted in the county of *Surry* of the murder of *W. L.* in *Southwark*, with a spit, he pleaded not guilty; and upon his arraignment it appeared, that the said *Cooper*, being a prisoner in the King's Bench, and lying in the house of one *Anne Carricke*, who kept a tavern in the Rules, the said *W. L.* at one of the clock in the night, assaulted the said house, and offered to break open the door, and brake a staple thereof, and swore he would enter the house and slit the nose of the said *Anne Carricke*, because she was a bawd, and kept a bawdy-house. And the said *Cooper* dissuading him from those courses, and reprehending him, he swore, that if he could enter he would cut the said *Cooper*'s throat: and he brake a window in the lower room of the house, and thrust his rapier in at the window against the said *Cooper*, who in defence of the house and himself thrust the said *W. L.* into the eye, of which stroke he died.

The question was, Whether this were within the statute of 24. *Hen.* 8. c. 5.?

THE COURT was of opinion, that if it were true he brake the house with an intent to commit burglary, or to kill any therein, and a party within the house (although he be not the master, but a lodger or sojourner therein) kill him who made the assault, and intended mischief to any in it, that it is not felony, but excusable by the said statute of 24. *Hen.* 8. c. 5. which was made in affirmance of the common law: wherefore the jury were appointed to consider of the circumstances of the fact; and they being a substantial jury of *Surry*, found the said *Cooper* not guilty upon this indictment: whereupon he was discharged.

Case 10.

Sir Martin Lyster *against* Home.

Trover for a hawk *ut de bonis p. ae iis* is good after verdict, for it shall be intended to have been reclaimed.

1. Roll. Ab. 6. Cro. Jac. 46. 262. Moor, 691. 3. Lev. 336. Cro. Eliz. 125. Owen, 93. Lut. 1359. 1. Com. Dig. 219. 5. Bac. Ab. 263.

TROVER AND CONVERSION of an hawk, called a ramish faulcon, supposing that he was possessed of that hawk *ut de bonis propriis, et casualiter omisit*, and that she came to the defendant's hand; and he knowing her to be the plaintiff's hawk, yet being required had not delivered her, but converted her to his own use. Upon not guilty pleaded, a verdict was found for the plaintiff.

WHITLOCK moved in arrest of judgment, that the declaration was not good to maintain this action, Because he doth not shew that she was a reclaimed hawk, and made tame, nor that she had bells or varvels to shew who was her owner: and a ramish hawk is properly such an one as liveth *inter ramos*, and from thence hath its name; and therefore relied upon THE BOOK 14. *Eliz. Dyer*, 306. *Sir Richard Fines' Case*.

JONES and BERKLEY inclined to this opinion.

But *I* conceived the declaration to be good enough, because it is aided by the allegation, that he was possessed of the said hawk *ut de bonis propriis*; and that the defendant, knowing her to be his

his hawk, converted her, &c. And it differs from the caſe of *Sir Richard Fines*; for there, although the ſaid exception was taken to the count, yet it doth not appear but that the count was there held to be good enough.—But becauſe the defendant's plea was held good, it was adjudged againſt the plaintiff, not for the inſufficiency of the count, but upon demurrer upon the plea in bar, which was held ſufficient. *Vide* 1. *Co.* 17. *The Caſe of Swans*, of what beaſts and birds a man may have property. SIR MARTIN LYSTER *againſt* HOME.

This caſe was afterward moved again in *Hilary Term*, 15. *Car.* 1. and then, becauſe upon divers former motions the Court was always divided in opinion, the plaintiff, for his greater expedition, conſented that judgment ſhould be entered againſt him:—ſo the judgment was entered, *quòd nihil capiat per billam.*

THE PLAINTIFF brought a new action in the common pleas, and amended the fault in his declaration, and had judgment by confeſſion of the action, and only three pounds damages given by a *London* jury; and thereupon HENDEN moved in this court to have coſts in his former action.—But becauſe the verdict was found for the plaintiff, and upon exception to the declaration judgment was given againſt him, THE COURT held, that no coſts ſhould be given. If judgment be arreſted, the plaintiff in a new action ſhall not recover the coſts of the firſt. Ante, 175. Cro. Jac. 159. 1. Hetley, 50. 2. Com. Dig. 549. 1. Bac. Ab. 511.

Trinity

Trinity Term,

15. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

CASE 1.

Swyft, Subchantor, and one of the Vicars Choral of Litchfield, *againſt* Eyres and Others, Leſſees of Sir Edward Peto.

Trinity Term, 12. *Car.* 1. *Roll* .

The grant of a remainder or reverſion to commence *in future*, is not good.
Ante, 362.
March. 33. Jones, 435. 1. Roll. 818. 2. Roll. 52. 3.

DEBT upon the ſtatute 2. *Edw.* 6. c. . for not ſetting forth the tithes of one hundred and forty acres of lands in *Cheſterton*, whereof the ſaid ſubchantor and vicar were proprietors, before they carried away their corn, for which the plaintiff demands the treble value, *viz.* one hundred and thirty-five pounds.

Upon *non debet* pleaded, it was found by ſpecial verdict, that the ſubchantor and vicars choral of *Litchfield*, being ſeiſed in fee of the rectory appropriate of *Cheſterton*, within which the ſaid one hundred and forty acres of land lay and were parcel, in the twenty-ninth year of *Henry* the eighth, by indenture demiſed and let to *John Peto* the tithes of the rectory for forty-two years (with an exception of the privy tithes, the four offering days, and the tithes of a meadow called *The Parſon's Hay*, and the preſentation to the vicarage of *Cheſterton*), rendering 5l. 16s. 8d.: and that afterwards, by indenture tripartite, dated 26. *February*, 5. *Edw.* 6. betwixt the ſubchantor and vicars on the firſt part, *Richard Woodward* of the ſecond part, and *John Woodward*, father of the ſaid *Richard Woodward*, on the third part, reciting the ſaid leaſe of 29. *Hen.* 8. and that the ſaid *John Woodward* had bought the ſaid leaſe of the ſaid *John Peto*, they confirmed and ratified the ſaid leaſe; and further, for a great ſum of money to them paid, &c. demiſed and granted to the ſaid *Richard Woodward* and *John Woodward* all the ſaid tithes, with the tithe hay (except the ſaid privy tithes, and the ſaid four offering days, and the preſentation of the clerk, &c.), "HABENDUM from and after the ſaid term and determination thereof and the years in the ſaid indenture compriſed, "in manner and form following, that is to ſay, to the ſaid *Richard* "*Woodward*, for one month after the end and determination of "the ſaid term and years within the indenture compriſed; and "after the ſaid month fully determined, to have and to hold the "ſaid tithes and premiſes (except before excepted) to the ſaid "*John Woodward*, his heirs, and aſſigns, for ever, rendering "6l. 4s. 4d. *per annum*." And they find, that by virtue of this grant the tithes renewing of the tenements in *Cheſterton* aforeſaid had

had been enjoyed always after this grant: and further, that afterward, *viz.* on the 23d *March*, 2. & 3. *Philip & Mary*, the said ſubchantor and vicars choral made another indenture, which they find *in hæc verba*, mentioning, "that for divers great ſums to "them paid by *Humphry Peto*, and the rent therein afterwards to "be reſerved, they did demiſe and grant to the ſaid *Humphry Peto* "all that their glebe lands lying in *Cheſterton*, VIZ. ſeventy-eight "acres of land, and alſo the demeſnes of the ſaid ſeventy-eight "acres, with all profits, commodities, tithes perſonal and predial, "whatſoever they be or ſhall fortune to be, belonging to the ſaid "ſubchantor and vicars, as parſons and proprietaries of the pariſh-"church of *Cheſterton* aforeſaid, as the tithes of pig, gooſe, lamb, "wool, calf, fiſh, ſwans, wood, and all other tithes whatſoever; "AND ALSO the tithes of the ſaid ſeventy-eight acres, all which lately "were in the ferm or occupation of *Margaret Peto*, widow, de-"ceaſed; AS ALSO all other their rights and intereſts, tithes, com-"modities, and profits, in and to the ſame, which to them do be-"long, or appertaining to the parſon or parſons and proprietaries "of the pariſh-church of *Cheſterton* aforeſaid (the ſaid yearly rent "hereafter reſerved, and the nomination and preſentment of the "prieſt or curate there, with all offerings and offering days, and "privy tithes, as well of the manor-place as of other the inha-"bitants there, always excepted and reſerved to them and their "ſucceſſors for ever), HABENDUM to him and his heirs for ever, "rendering annually to them and their ſucceſſors ſix pounds ſe-"venteen ſhillings four-pence." And it is found, that the tithes of theſe lands never were in the tenure of the ſaid *Margaret Peto*; but they found, that ſome tithes and lands were in the tenure of the ſaid *Margaret Peto*: and it was alſo found, that *Sir Edward Peto* is ſon and heir of the ſaid *Humphry Peto*, and that the defendants were occupiers of the lands in the declaration mentioned, and carried the corn growing thereupon without ſetting out of the tithes. *Et ſi ſuper, &c.* the Court ſhall adjudge it for the plaintiffs, they find for them, and that the tithes carried away were worth thirty pounds *per annum*, and the treble value is ninety pounds; for the reſidue, they find for the defendants.

SWYFT, &c. *againſt* EVERS, &c.

This caſe was argued at the bar by THE SOLICITOR GENERAL, ROLLE, and MAYNARD, *for the plaintiffs*, and by THE ATTORNEY GENERAL, SERJEANT HENDEN, and GRIMSTON, *for the defendants*; and this Term it was argued at the bench, and two queſtions made:

FIRST, Whether the deed of the fifth of *Edward* the ſixth be good to convey the inheritance to *John Woodward*?

SECONDLY, If the firſt indenture be not good, Whether the ſecond indenture of 2. and 3. *Philip & Mary* be ſufficient to convey them, againſt the ſubchantor and vicars, to *Humphry Peto*? for if any of them be good, then the plaintiffs have no title.

And as to the firſt, ALL THE JUSTICES argued for the plaintiffs, that they have a good title, notwithſtanding this indenture; for this indenture is merely void, becauſe it is to convey an inheritance *in futuro*; for the month is not to begin until the fort and two years be expired; and it is a grant of *intereſſe termini*, and no grant

1. Roll. 828.

Swyft, &c. against Eyres, &c.

grant of a reverſion; for the inheritance is granted therein, which was not in leaſe before; and as it is an *intereſſe termini* for the tithe hay, ſo ought it to be of the reſidue, for there cannot be fraction of the eſtate; and then being only an *intereſſe termini* in *Richard Woodward*, there cannot be a grant of a remainder or reverſion to commence *in futuro*. And to prove this, ſee 5. *Co.* 25. *Buckler's Caſe*; and 8. *Hen.* 7. 3. *et* 38. *Hen.* 6. 34.

A leaſe of "all "that glebe "land lying in "*A. viz.* ſe- "venty-eight "acres of land, "and alſo all "the tithes of "the ſaid ſe- "venty-eight "acres, *all "which lately "were in the "ſeru or occu- "pation of B.*" is ſufficiently certain to paſs the tithes, although they never were in the occupation of *B.*; for the words "*all "whichwere "lately, &c.*" ſhall be taken as an explanation, and not as a reſtriction.

Moor, 45. Cro. Jac. 3. Dyer, 376. 92. Cro. Eliz. 14. Savil. 114. 3. Com. Dig. 332. 2. Mod. 3.

The Second Queſtion was, Whether the deed of 2. & 3. *Philip & Mary* be ſufficient to convey thoſe tithes, becauſe they never were in the tenure of *Margaret Peto?* And it was ſtrongly urged for the plaintiff, that thoſe words in the indenture were a clauſe of reſtriction, and declares their intent that nothing ſhould paſs but that which was in the tenure of *Margaret Peto.*— But all the Juſtices held, that it was a good grant, and no reſtriction of the firſt words, becauſe there are three diſtinct clauſes before, *viz.* firſt, the grant of the ſeventy-eight acres of glebe; ſecondly, the grant of the tithes predial and perſonal; thirdly, the grant of the tithes of the ſeventy-eight acres of glebe land; which are all diſtinct ſeveral clauſes by themſelves. And this clauſe, "all which, &c." doth not depend upon any of them; and "which were, &c." is a reſtriction only when the clauſe is general, and is all but one and the ſame ſentence, and not ended or certain before the end of the ſentence, as in the Caſes of 2. *Edw.* 4. *pl.* 29. *Plow.* 391. in *Wrothſley v. Adams*, and *Plowd.* 395. in *the Earl of Leiceſter's Caſe*; but where the clauſe is not in one entire ſentence, but diſtinct and disjoined from the other, as here it is, there cannot be any reſtriction. Alſo, this being in the caſe of a common perſon, addition of a falſe thing (*viz.* falſe poſſeſſion) ſhall never hurt the grant; for the addition of a falſity ſhall never hurt where there is any manner of certainty before, as *Dodington's Caſe* (*a*), and *Bozoon's Caſe* (*b*). But in the king's grants, where there is falſity in point of prejudice to the king's benefit, or a miſ-information of the king's title, or upon a falſe ſuggeſtion of the party, there all grants ſhall be void, as it is 10. *Co.* 113. 21. *Ed.* 4. *pl.* 48. 8. *Hen.* 7. *pl.* 3. 9. *Hen.* 6. *pl.* 28. Wherefore they all concluded, that this grant of 2. & 3. *Philip & Mary* was good: and it is to be obſerved, that although theſe words, "which were in the tenure of *J. S.*" when they are in one and the ſame ſentence, may be conſtrued to be a reſtriction, yet in theſe words, "all which were, &c." this word "all," ſo disjoined, cannot be a reſtriction, but an explanation: wherefore for theſe and other reaſons it was adjudged to be a good grant againſt the plaintiff.

But in conſideration and commiſeration of the poor vicars, *Sir Edward Peto* was moved to add by way of a rent-charge to their means; and he agreed to the motion of the Court, and added four pounds *per annum* rent for their further ſuſtentation, beſides the rents paid to them.

(*a*) 2. Co. 32. (*b*) 4. Co. 34. See alſo Dyer, 376.

Criſp

Criſp *againſt* Pratt.

CASE 2.

Hilary Term, 10. *Car.* 1. *Roll* 73.

EJECTMENT of ſixteen acres of paſture in *Chipping-Barnet*. The caſe was, That *Ralph Briſco* ſenior, in 19. *Jac.* 1. purchaſed the lands in the declaration mentioned, being copyhold, parcel of the manor of *Chipping-Barnet*, to him and *Margaret* his wife, and to *Ralph Briſco* their ſon and his heirs. Two years after he became an innkeeper, and received all the profits of the land until 4. *Aug.* 4. *Car.* 1. at which time he became debtor by bond to *John Briſco* and others, and committed divers acts (mentioning the acts) which declared him to be a bankrupt. In 5 *Car.* 1. upon a petition to the lord-keeper, that the ſaid *Ralph Briſco* ſenior was an innkeeper, and did get his living by buying and ſelling, and was indebted to divers perſons, and become a bankrupt, the petitioners prayed to have a commiſſion of bankrupt, which was granted them; and the commiſſioners adjudged him a bankrupt, and ſold this land to the leſſor of the plaintiff, for the benefit of the creditors, by indenture inrolled; which being ſhewn to the lord of the manor, he admitted him accordingly. Afterwards *Ralph Briſco* the father died, and the ſaid *Margaret* died, and *Ralph Briſco* the ſon entered, and the leſſor of the plaintiff entered upon him, and made a leaſe to the plaintiff for years; and the defendant, as ſervant of the ſaid *Ralph Briſco* the ſon, *ouſted* him. *Et ſi ſuper totam, &c.* the Court ſhall adjudge for the plaintiff, they find for the plaintiff; if otherwiſe, for the defendant.

Although on a ſpecial verdict the jury find ſuch facts as would well have warranted them to have inferred fraud, yet if they do not expreſsly find the fraud, the Court cannot preſume it.

1. Roll. Ab. 525. Jones, 437. March. 34. 3. Lev. 309. Skinner, 291. 5. Co. 60. Hob. 72. 10. Co. 56.

Upon this matter found, it was argued at the bar, and this Term at the bench; and BERKLEY argued *for the plaintiff*, and BRAMPSTON, JONES, and MYSELF, *for the defendant*.

THE FIRST QUESTION was, the jury finding that the ſaid *Ralph Briſco* ſenior did get his living by buying and ſelling, uſing the trade of an innholder, and not otherwiſe, Whether he be a perſon who is a bankrupt, and within the ſtatutes of 13. *Eliz.* c. 7. 1. *Jac.* 1. c. 15. and 21. *Jac.* 1. c. 19. (*a*)?—And BERKLEY held, that he was a bankrupt within thoſe ſtatutes; for an innholder is one who hath much uſe of buying and ſelling for the entertainment of his gueſts and their horſes; and running in debt by this means, it is reaſon he ſhould be accounted a perſon within the ſaid ſtatutes: and ſo much the rather, becauſe the jury find that he got his living by buying and ſelling, uſing the trade of an innholder. —But all THE OTHER THREE JUSTICES argued to the contrary in this point; for an innholder doth not get his living by buying and ſelling; for although he buy proviſion to be ſpent in his houſe, he doth not properly ſell it, but utters it at ſuch rates as he thinks reaſonable gains, and the gueſts do not take it at a certain price, but they may have it or refuſe it if they will. And if an hoſt take exceſſive prices, he is indictable (*b*). And innkeepers many times have hay and corn, and ſuch things, of their own growing; and their gain is not only by uttering of their commodities, but for the attendance of their ſervants, and for the furniture of their houſe, rooms, and lodgings, for their gueſts: and an inn-

An innkeeper, *as ſuch*, is not a trader within the bankrupt ſtatutes.

3. Mod. 329. 8. Mod. 47. 12. Mod. 159. 307. 2. Bl. Com. 476. Carth. 150. 2. Wilſ. 169. 3. Wilſ. 146. 4. Burr. 2067. Ld. Raym. 287. 852. 2. Peere Wms. 308. 3. Peere Wms. 298. 1. Bro. Ch. Ca. 174. 1. Com. Dig. 504. 1. Term Rep. 38.

(*a*) *Vide* 5. Geo. 2. c. 30.

(*b*) Cook's Bank. Laws, 32.

CRISP *against* PRATT.

keeper is no more ſuch a perſon who gets his living by buying and ſelling than fermors, who buy for their proviſion: and the ſtatutes mention only thoſe who are merchants, and uſe to buy and ſell in groſs or by retail, and ſuch who get their living by buying and ſelling, ſo as their principal means is by buying and ſelling.

Copyhold eſtates are within the bankrupt ſtatutes, and may be aſſigned by the commiſſioners. Poſt. 568.

Jud. Ref. 112. 3. Stone, 127. 1. Atk. 96. 1. Com. Dig. 516. 2. Com. Dig. 528. See 5. Geo. 2. c. 30. Cooke's Bank. Laws, 354.

SECONDLY, The queſtion was, Whether a copyhold be within the ſaid ſtatutes to be ſold by the commiſſioners? for although it be expreſsly named in the 13. *Eliz.* c. 7. in one clauſe, yet it is not in another; and in the 1. *Jac.* 1. c. 15. and 21. *Jac.* 1. c. 19. (upon which laſt ſtatutes this caſe is grounded), copyholds are not mentioned, but generally all lands, tenements, and hereditaments.—But all THE FOUR JUSTICES agreed, that copyholds are within the intent and purview of all the ſaid ſtatutes; for being in the firſt ſtatute, and the other ſtatutes made in further confirmation and approbation thereof, they ought to be expounded liberally, and ſhall be conſtrued accordingly, to make as ſtrong proviſion as they may againſt the bankrupt.

Copyhold lands given by a father to his ſon two years before the father became bankrupt, if done *bonâ fide* and without fraud, ſhall not be aſſigned by the commiſſioners.—Fraud is a fact, and muſt be found by the jury.

Jud. Ref. 113. 4. 1. Com. Dig. 525. 1. Burr. 467. 477. 484. 2. Burr. 827. Dougl. 282. 86. 1. Bl. Rep. 441. 2. Bl. Rep. 996. 362. 2. Peere Wms. 427. 3. Wilſ. 47. Cowp. 124. 705. 5. Bac. Ab. 312. Dougl. 716.

THIRDLY, Foraſmuch as it is found, that this land was given by the father (two years before he was an innholder, and ſix years before he became a debtor) unto his ſon, and no fraud found (although there be circumſtances of fraud, by the taking of the profits only, until the time he became a bankrupt), Whether it be in the power of the commiſſioners to ſell it?—And BERKLEY held ſtrongly, that it was in their power, becauſe it is expreſsly within the words of 21. *Jac.* 1. c. 19. that they ſhall ſell lands which he purchaſed in the name of his wife, children, or friends, named and intruſted by him; and this is ſo purchaſed.—But ALL THE OTHER JUSTICES were of the contrary opinion; for being purchaſed before he was a tradeſman, and ſo long before he became a debtor, is not within the ſtatute; for the ſtatute intends ſuch perſons only who gained their livings by buying and ſelling, and by fraud had paſſed away their lands to friends in truſt, and became indebted, and committed ſuch acts of a bankrupt, that for ſuch acts done by them after it ſhould be within the commiſſioners power to ſell ſuch their lands. But here, many years before, when he was a clear man, he procured this land to be ſettled upon his ſon (no fraud, or purpoſe of being a bankrupt, being found): it would therefore be a miſchievous caſe, and full of inconveniences, if it ſhould be within the ſtatute; for none might know with whom to deal by way of marriage or otherwiſe when he is not a tradeſman, and ſettles land upon his wife and children *bonâ fide*, and without cauſe of being ſuſpected to be a bankrupt, and afterwards becomes a tradeſman, and then a bankrupt, if this act ſhould overthrow a conveyance duly ſettled. And for that purpoſe was cited 2. *Co.* 25. and 10. *Co.* 56. *Chancellor of Oxford's Caſe*, that fraud ought not to be conceived unleſs it be expreſsly found; for *Fraus eſt odioſa et non præſumenda* (*a*). And in the tenth of king *Charles* 1. *Lady Gorge's Caſe*, where *Earl Lincoln* purchaſed a manor in that lady's name, being his daughter, and afterwards kept courts, and made leaſes in his own name, and always took the profits, and then ſold it to *Sir Sydney Montague*, and *Lady Gorge* never queſtioned it in the life-time of her father; yet it was held in this court, unleſs there

(*a*) 1. Ld. Raym. 725. Bull N. P. 40. 1. Salk. 110. Palm. 325. 10. Co. 57. 2. Mod. 244. 245. 12. Mod. 628. Cowp. 434.

by

be ſome fraud diſcovered, it is not within the ſtatute of 27. *Eliz.* c. 4. although there be many badges of fraud: ſo here.—Wherefore it was adjudged for the defendant.

CRISP *againſt* PRATT.

Dennis *againſt* John Payn ſenior.

CASE 3.

Hilary Term, 14. Car. 1. Roll 680.

DEBT upon an obligation of eighty pounds. The defendant pleaded, that the plaintiff, in the court of *Poole*, being a court of record, had brought debt upon the ſame bond againſt *John Payn* junior, wherein *John Payn* ſenior and *John Payn* junior were jointly and ſeverally obliged with condition for the payment of forty pounds: that after a plea pleaded the plaintiff entered a *retraxit*, and the defendant averred that it was the ſame obligation, and that the ſaid *John Payn* junior, named in the bond, and the ſaid *John Payn* againſt whom the *retraxit* was, is one and the ſame perſon; and demands judgment, if againſt this *retraxit* he ought to ſue, &c.: and upon this it was demurred.

A *retraxit* entered in an action of debt on bond againſt *one* of *two* joint and ſeveral obligors, cannot be pleaded in bar to a ſecond action on the ſame bond. *Sed quære.* Ante 373.

WHITLOCK, *for the defendant*, argued, that this *retraxit* is in nature of a releaſe, and *quaſi* a releaſe, as it is in *Beecher's Caſe* (*a*); and a releaſe to the one obligor is a diſcharge to the other; and if one obligor be made executor to the obligee, it is a diſcharge for all the obligors. So if a *feme obligée* take one of the obligors to huſband, it is a diſcharge to them all.

S.C. Jones, 451. S.C. March. 95. Co. Lit. 139. a. Daliſon, 78. 243. Carth. 63. Salk. 573. 575. 1. Com. Dig. 111. 552.

ROLLE, *for the plaintiff*, argued, that it is a bar only by way of *eſtoppel* betwixt that obligor and the obligee, whereof no other perſon ſhall take advantage; and it is not any releaſe *in facto*, but only *quaſi* a releaſe, and that this plea is no bar for the other obligor.

1. Cromp. Prac. 124. 12. Mod. 415. 448. 550, 551. Ld. Ray. 420. 688.

I inclined to that opinion, that it is neither a releaſe in fact nor in law, but *quaſi* an agreement that he will no further proſecute; and it may be, the ſaid *John Payn* junior paid the moiety of the ſaid debt, and the obligee agreed to accept it of him, and that he would no further proceed againſt him, and being jointly and ſeverally bound, he might make ſuch an agreement, and not diſcharge the bond.

But BERKLEY held, that the plea was good, and was a good bar; for it is a bond joint and ſeveral; and one of them being diſcharged, it cannot now be a joint bond; therefore the diſcharge *quoad* the one is alſo a diſcharge *quoad* the other.—But being no other Juſtices in the court, it was adjourned.

(*a*) 8. Co. 58.

Evelin's Caſe.

CASE 4.

EVELIN being elected by the pariſhioners of *St. Thomas* to be churchwarden there with another, the parſon, pretending that by the Canons (*b*) he was to make election of the other, named

A *mandamus* lies to the ſpiritual court to adminiſter the oath to a perſon elected churchwarden by pariſhioners in *London*. Poſt. 589.—S.C. Jones, 439. Ab. 234. S. C. 2. Roll.

(*b*) By the 89th Canon churchwardens are to be choſen by the parſon and pariſhioners jointly; and if they cannot agree, then one by the parſon and the other by the pariſhioners. Burn's E. L. title "Churchwardens."

EVELIN'S CASE.

March. 22. 66. Ray. 439. Palm. 51. Lutw. 1010. Noy, 31. 139. Cro. Jac. 532. 1. Vent, 115. 267. 2. Vent. 41. Carth. 118. 1. Lev. 75. 145. Stra. 145. 1246. B. R. H. 130.

one *Hill* to be churchwarden, and procured *Doctor Clark's* official to ſwear the ſaid *Hill* and to refuſe *Evelin*; whereupon the pariſhioners ſurmiſing, that they had a cuſtom within the pariſh, time whereof, &c. to elect both the churchwardens, and that the Canons cannot take away their cuſtom, prayed a writ to *Doctor Clark* to admit the churchwarden elected by them, and to ſwear him, and amove the churchwarden elected by the parſon. And a precedent was ſhewn in the reign of *King James* where ſuch a writ was granted, and it was ſaid there were divers other like precedents. And becauſe the churchwardens in *London* are, for the greateſt part, corporations and owners of land deviſed to them, the writ was granted.

6. Mod. 89. 4. Com. Dig. 207. Cowp. 413.

A cuſtom that the parſon ſhall chuſe a churchwarden ſhall be tried in the temporal court. —

And THE COURT (being informed that the ſaid *Hill*, elected churchwarden by the parſon, ſued the ſaid *Evelin*, elected by the pariſh, in the eccleſiaſtical court) granted a prohibition, to the intent it might be tried whether there were any ſuch cuſtom or no.

6. Mod. 89. 3. Salk. 88. 2. Ld. Ray. 1008. 1. Bac. Ab. 371. 3. Term Rep. 3.

CASE 5.

Wolnough's Caſe.

If parties be in cuſtody for refuſing to enter into a recognizance, and bring a *habeas corpora*, and the attorney general prays time to maintain the return, the Court will admit the parties to bail.

Poſt. 557.

S. C. Noy, 156. 2. Hawk. P.C. 173.

WOLNOUGH and ſeven others were committed by the mayor of *London* to *Newgate* for refuſing to enter into recognizance to appear before the lords of the council; and upon a *habeas corpora* returned by the mayor and ſheriffs it appeared, that by an order from the council-table they were appointed to come before the mayor and ſheriffs to treat concerning foreign matters; and when they appeared, being required by the mayor, being in commiſſion of *oyer* and *terminer* for the city, to perform the order of the lords of the council, and to enter into recognizance in a reaſonable ſum, they refuſed; whereupon he committed them.

PEARD, MAYNARD, and KEELING junior, argued, that this return was not good: FIRST, Becauſe it doth not mention the order, nor ſhew what the order was, ſo as THE COURT might adjudge thereof. SECONDLY, Becauſe the recognizance is demanded for them to appear before the lords of the council, no time nor place appointed, nor cauſe ſhewn why it was demanded.

And becauſe the king's counſel prayed time to maintain the return, the parties were bailed until next Term.

CASE 6.

Arundel *againſt* Mare.

It is actionable to call *a merchant* "a cheating knave."

Ante, 507. 516. Poſt. 558. 563. 570.

1. Roll. Ab. 60.

ACTION FOR WORDS. Whereas the plaintiff was a merchant, &c. that the defendant ſaid, "He was a cheating "knave, and had cheated his father by returning twenty pounds "for wares, &c."

It was moved in arreſt of judgment by ROLLE, that an action lies not for calling one "cheating knave."

But foraſmuch as he was a merchant, and it touched his profeſſion, BERKLEY and MYSELF (*cæteris abſentibus* in the ſtar-chamber) held, that the action was maintainable: whereupon rule was given, that the plaintiff ſhould have judgment.

Bagnall

Bagnall *againſt* Knight.

CASE 7.

Eaſter Term, 15. *Car.* 1. *Roll* 465.

ERROR of a judgment in the common pleas, in an action on the caſe in nature of a conſpiracy. The plaintiff declared, that the defendant *falsò et malitiosè* cauſed ſuch an indictment of perjury to be written containing *hanc falſam materiam*, &c. reciting it *verbatim*, and exhibited it to the grand jury before the juſtices of peace at *Weſtminſter*, and procured it to be found; and that afterwards *Sir Edward Spencer*, one of the juſtices of the peace of *Middleſex*, before whom, &c. delivered it with his own hands to the juſtices of gaol-delivery and of *oyer* and *terminer* at the *Old Bailey* for the city of *London* and the county of *Middleſex*, whereby he was brought to the bar under the ſheriff's cuſtody, arraigned, and acquitted (*a*). Judgment being given in the common pleas for the plaintiff, the defendant brings a writ of error.

An action for malicious proſecution muſt ſhew that it was within the proper juriſdiction, and that the indictment was good;—but *ductus ad barram* implies he was in gaol.

2. Bulſt. 271. Cro. Jac. 357. Cro. Eliz. 564. 724.

WORLICH and FARRER moved, that the declaration was not good: FIRST, Becauſe it is by way of recital of the indictment only; and they relied upon the Caſe of *Browning v. Beeſton* (*b*). —*Sed non allocatur*; for it is *ſcribi fecit talem falſam materiam*, which is a direct affirmative.

1. Sid. 15. 1. Roll. Ab. 111. Yelv. 46. 116. 1. Com. Dig. 160. Stra. 691. Dougl. 215.

SECONDLY, Becauſe he doth not ſhew that he was in the gaol, and then the Juſtices of the gaol-delivery have no power to meddle with him.—*Sed non allocatur*; for *ductus ad barram et ſub cuſtodiâ* ſhews him to be in the gaol.

(*a*) 9. Co. 56. 12. Co. 23. F. N. B. 115. Car. 286. 315 419. Stra. 114. 1. Sid. 15. Cro. Jac. 131. 230. Cro. (*b*) Plowd. 136.

Dalby *againſt* Dorthall and his Wife.

CASE 8.

Michaelmas Term, 14. *Car.* 1. *Roll* 415.

ERROR of a judgment in an action on the caſe in nature of a conſpiracy, For cauſing them to be indicted of felony falſely and maliciouſly, and to be detained in priſon *quouſque* they were acquitted, *ad damnum ipſorum*, &c. Upon not guilty pleaded, a verdict was found for the plaintiffs; and judgment being given for them,

Huſband and wife may join in an action of conſpiracy for malicious proſecution againſt them both; or the huſband may have it alone; for though it is for a *tort*, yet it is grounded on one entire record.

Ante, 175. Jones, 440. Cro. Jac. 355 472. 1. Com. Dig. 575. 3. Ter. Rep. 627.

The error aſſigned was, Becauſe it was *ad damnum ipſorum*, whereas a wife cannot join with her huſband for damages, for it is a ſeveral damage to either of them.

BERKLEY, *Juſtice*, upon the firſt motion, was of that opinion; for it is a ſeveral wrong to either of them, and the wife may not join for a *tort* done to her huſband.

But *I* held the contrary, becauſe it is grounded upon one entire record, by which they were both prejudiced, and they may join if they will; or the huſband only may have the action for it, that he was damnified.—Whereupon it was adjourned, *cæteris abſentibus*.

Child *againſt* Greenhill.

CASE 9.

Trinity Term, 14. *Car.* 1. *Roll* 664.

TRESPASS for entering and breaking his cloſe and fiſhing *in ſeparali piſcariâ ſuâ*, and for taking *piſces ſuas ibid. viz.* 100 eels, &c. After verdict, upon not guilty pleaded, and found for the plaintiff, and damages entire given,

The owner of a *ſeveral fiſhery* hath a privileged property in the fiſh therein, and treſpaſs will lie for taking them. Ante, 388.

CHILD *againſt* GREENHILL.

Co. Lit. 122. 127. b. *in notis.* 7. Co. 17. Cro. Eliz. 195. F. N. B. 89. 3. Lev. 227. March. 48. 5. Mod. 375, 376. 6. Mod. 183. 12. Mod. 144. Salk. 556. 637. Carth. 286. Ld. Ray. 250. 5. Com. Dig. 352. Dougl. 56.

EXCEPTION was taken in arreſt of judgment by MAYNARD and ST. JOHN, That the declaration was not good to ſay *piſces ſuas*, for he hath not any property in the fiſh, until he takes them, and hath them in his poſſeſſion.

But ROLLE and GRIMSTON, *for the plaintiff*, ſaid, that being they were *in ſeparali piſcariâ ſuâ*, it may well be ſaid *piſces ſuas*, for there is not any other may take them (*a*).

And of that opinion was ALL THE COURT, who ſeverally delivered their reaſons; for, for deer in a park, or conies in a warren, the owner hath a ſpecial property in them, as long as they are in the warren or park; ſo of doves in a dovecote. But for deer or conies, if they be not in a park or warren, he may not ſay *ſuas*, unleſs he add that they were domeſtic. Wherefore being taken out of his ſeveral piſcary, and not *extra liberam piſcariam ſuam*, the action is maintainable; and it was adjudged for the plaintiff. *Vide* 43. *Edw.* 3. *pl.* 24. 3. *Hen.* 6. *pl.* 55. 22. *Hen.* 6. *pl.* 59.

(*a*) See *Mr. Hargrave's* note (7) to page 122. a. Co. Lit. 126. b.

CASE 10.

Sprigg *againſt* Rawlinſon.

Michaelmas Term, 14. *Car.* 1. *Roll* 153.

Ejectment, while proceedings were in *Latin*, would not lie "*de repoſitorio*," except its meaning was aſcertained by ANGLICE, "*warehouſe*." Ante, 188. 512.

ERROR of a judgment in the common pleas, in an ejectment of a leaſe of a meſſuage "*et unum* REPOSITORIUM *in parochiâ Omnium Sanctorum*; *habendum tenementa*, *&c.*" from the Feaſt of *The Purification* for five years; and that the defendant entered and ejected him from the lands aforeſaid. After verdict upon not guilty pleaded, and found for the plaintiff, and judgment for him,

ERROR was brought, and aſſigned, That "*repoſitorium*" is a perſonal thing called a "*cupboard*," which is removeable, and whereof an ejectment lies not.

S. C. 1. Jones, 454. Co. Lit. 223. b. 10. Co. 133. a. March. 96. Ld. Ray. 1470. Stra. 54. 71. 695. 834. 5. Com. Dig. 274. Dougl. 305. 2. Term Rep. 11.

Whereupon it was demurred, and very well argued by PHESANT *for the defendant* in the writ of error, and by GRIMSTON *for the plaintiff*.

PHESANT urged, that "*repoſitorium*" is not only "*a cupboard*," but alſo "*a warehouſe*," and ſo is expreſsly mentioned to be in the Dictionary; and when *repoſitorium* may be intended *a warehouſe*, and a real thing which may be demiſed, it ſhall be taken rather that way, than to conſtrue it to be a cupboard, which cannot be demiſed.

And it was now argued by all the Juſtices. BERKLEY and MYSELF held, that the declaration is good and not erroneous; for if it had been with an ANGLICE, *a warehouſe*, it had been clearly good, as all the Juſtices agreed; and now that it is put without an *Anglicè*, being a good *Latin* word for *a warehouſe*, and ſo expreſſed in print, the Court may well take conuſance thereof as of a real thing demiſable; and when alſo it is mentioned with a tenement, and an entry and ejectment made thereof, it muſt be intended to be a warehouſe: and when the leaſe, upon which the action was brought, was ſhewn to the curſitors in chancery who made the writ, it being a warehouſe in the indenture, they tranſlated it *repoſitorium*, and well, becauſe they had the Dictionary to warrant

warrant it: and an ejectment lies thereof as well as of a chamber, as 5. *Hen.* 7. *pl.* 9.; or an aſſiſe *de cellariâ*, as 24. *Edw.* 3. *pl.* 33.; or of a ſhop, as 48. *Edw.* 3. *pl.* 4. and 14. *Aſſiſe*, 11. And although in *Savell's Caſe* (*a*) it is held, that an ejectment lies not of a cloſe, yet it was ſaid, that the contrary had been ſince adjudged in *Wykes v. Sparrow* (*b*). And BERKLEY ſaid, that an aſſiſe *de ulneto, bullariâ, ſaliná*, and ſuch like, although they be uncertain in the declaration, yet becauſe they may be made certain, is good enough: ſo here it is certain enough what the plaintiff ſhall recover, and of what the ſheriff ſhall put him in poſſeſſion (*c*); wherefore we concluded, that judgment ſhould be affirmed.

SPRIGG *againſt* RAWLINSON. Noy, 109.

But JONES and BRAMPSTON, *Juſtices*, ſaid, they conceived the declaration to be ill, becauſe *repoſitorium* for "*a warehouſe*" is not uſed nor known in the law; and they never heard or read of that word for *a warehouſe:* and in *Calepine* it is ſaid to be "*a voyder*;" and of ſuch words which be not uſual the law ſhall not take any conuſance, as they do of *cottagium, curtelagium, ſodina*, and the like, which are words known at the common law. Wherefore they would adviſe.—Afterwards in *Hil.* 15. *Car.* 1. becauſe the Court were ſtill divided in their opinions, the defendant in the writ of error, for his expedition, commenced a new action, and conſented that this judgment ſhould be reverſed.

Styles, 215. Cro. Eliz. 818. 2. Bul. 114. Palmer, 337. Strange, 1063. 1084. Andr. 106.

(*a*) 11. Co. 55.
(*b*) Trinity, 15. Jac. 1. Roll 774. Cro. Jac. 436.
(*c*) 1. Burr. 629. 5. Burr. 2673. 2. Bac. Abr. 169. Stra. 635.

Young *againſt* Fowler.

CASE 11.

Hilary Term, 14. *Car.* 1. *Roll.* 1264.

ACTION UPON THE CASE for diſturbing him to execute his office of the REGISTER OF THE DIOCESE of *Rocheſter*. Upon not guilty pleaded, a ſpecial verdict was found, That from time whereof memory, &c. the *Biſhop of Rocheſter*, for the time being, hath uſed to grant the office of the Regiſter for all cauſes within the dioceſe of *Rocheſter*, as well in poſſeſſion as in reverſion, for life, *habendum et exercendum* by ſuch a perſon to whom ſuch a grant is made, when the office comes into poſſeſſion, *per ſe vel ſufficientem deputatum, habendum* for the life of ſuch a perſon to whom ſuch a grant ſhould be made. And they find the ſtatute of 1. *Eliz.* c. 19. and that *Thomas Wardgar* was officer for his life, 20th *June* 1590, and was in poſſeſſion for his life by a former grant: and he being ſo in poſſeſſion, *John Young*, biſhop of *Rocheſter*, *eodem* 20th *June* 1590, by his deed granted the ſaid office to *John Young* the plaintiff, *habendum et exercendum per ſe vel ſufficientem deputatum ſuum* for his life, when it ſhould be void by the death or ſurrender of the ſaid *Thomas Wardgar*, which was confirmed by the dean and chapter by their deed 23d *June* 1590. And they find, that the ſaid *John Young* at the time of the grant was *an infant* of the age of eleven years and ſix weeks, and not above; but that he attained the full age of one-and-twenty years in the lives of the biſhop and of the ſaid tenant for life: and that the biſhop died in

A grant by the biſhop of the office of regiſter of a dioceſe, in reverſion after the death of the tenant for life, to an infant of eleven years of age, *exercendum per ſe vel deputatum ſufficientem*, is good, notwithſtanding the infancy; but if he make an inſufficient deputy, it is a forfeiture of the office. Ante, 280. March. 4. 38. 1. Roll. Ab. 731. 2. Roll. Ab. 153. 9. Co. 97. Dyer, 150. Hob. 143. 4. Mod. 279.

Cro. Eliz. 636. Co. Lit. 3. 2. Inſt. 382. 4. Com. Dig. 285. Caſes Tempus Talbot, 106.

YOUNG *against* FOWLER.

5. *Jac.* 1. and that *Wardgar* died in 15. *Jac.* 1.; and that the defendant disturbed him to exercise the said office: *Et si super totam materiam* the Court shall adjudge for the plaintiff, they find for the plaintiff, and assess damages to eighty pounds and costs; and if, &c.

This Case was argued at the bar by MAYNARD, *for the plaintiff*, and by WARD, *for the defendant*.

THE FIRST QUESTION was, Whether this grant of this said office to an infant of the age of eleven years, *exercendum per se vel deputatum suum* in reversion, after the death of a tenant for life, be good, or not?

SECONDLY, Whether an office for life, usually granted in possession or reversion, being granted by the bishop in reversion, and confirmed by the dean and chapter, be good to bind his successors?

As to the first, ALL THE JUSTICES held, that this grant of the office in reversion, after the death of tenant for life, to an infant of the age of eleven years *exercendum per se vel deputatum sufficientem* (as the usual grants are) is good, notwithstanding the infancy; and notwithstanding the opinion cited in *Co. Lit.* 3. and there said to be resolved 40. & 41. *Eliz. Scambler v. Walter*, that the grant of *the office of an under-stewardship* in possession or reversion to an infant is void, because he is incapable thereof, not having knowledge to execute *pro commodo regis et populi* (*a*). But this case was denied, unless it be with this difference, where it is granted with such a clause to exercise it *per se vel deputatum*; and where he is of such a tender age that he cannot by intendment execute it by himself, as being an infant of three or four years of age, who hath not discretion to execute it: but when there is a clause to execute it *per se vel deputatum suum sufficientem*, it is good enough; for he may appoint a sufficient deputy; and if he doth not elect such, it is a forfeiture of his office: and a deputy is allowed, especially in ministerial offices, and to be approved by the Judges of that court: and as an infant may present to a church, because the ordinary gives the allowance whether the clerk be sufficient, so the lord of the manor or the Judge of the court is to give approbation of the deputy's sufficiency; and if the deputy misdemean himself in his office, or be unskilful, it is a forfeiture and at the infant's peril: and as an infant may have an office by discent, as to be sheriff, or warden of the Fleet, and the like, which are offices of charge and of trust, so he may have an office by grant: nor was the plaintiff here merely incapable of this office, especially it being granted in reversion after the death of the tenant for life; which fell not unto him until he had attained his full age, and was sufficiently able to execute it. Also if it had fallen unto him at the time of the grant, he was then of such age as by intendment he might have written the acts and orders, &c. or made election of a sufficient deputy. Therefore they all concluded, that the grant was good notwithstanding this exception. *Vide* 5. *Edw.* 4. 3. & 48. *Dyer*, 150. 39. *Hen.* 6. *pl.* 32. 11. *Edw.* 4. *pl.* 1. 1. *Hen.* 7. 28. 9. *Edw.* 4. *pl.* 5. & 26. where an office may be entailed and granted in fee, 21. *Edw.* 4. *pl.* 13. An infant may be a mayor; and the acts by the mayor and commonalty shall not be avoided by the nonage of the mayor, *Co. Lit.* 107.

1. Inst. 59. Ld. Raym. 658. 1. Leon. 288.

(*a*) R. 598. Ante, 279. Cro. Jac. 18. Cro. Eliz. 637. 1. Rol. 731. Co. Cop. 125. Cowp. 222.

Cro. Eliz. 637. Ante, 279. Moor, 845. 3. Bac. Ab. 736.

Co. Lit. 233. b.

Hob. 142. Co Lit. 3. b. Mr. Hargrave's note (4).

Co. Lit. 43. a.

107. 18. *Edw.* 3. *pl.* 3. 12. *Co.* 8. 27. *Hen.* 6. "*Grants*," 12, "*Infant preſents*," *Co. Lit.* 234. concerning Offices, 10, *Hen.* 4. *pl.* 14. Contracts bind an infant.

YOUNG *againſt* FOWLER.

THE SECOND POINT WAS, Whether the grant of an office for life in reverſion, being uſually *ſo* granted by the biſhop, with confirmation of the dean and chapter, be good againſt the ſucceſſor, or void by the 1. *Eliz.* c. 4. f. 34. WARD objected, That it was void, becauſe it is not neceſſary, when there is an officer in poſſeſſion, to make another officer: and when it is not neceſſary to be granted, it is void againſt the ſucceſſor by the ſaid ſtatute; as it is held in the caſe of the *Biſhop of Sarum*, 10. *Co.* 60, 61.—But THE JUSTICES reſolved to the contrary: for being found to be an office uſually granted in poſſeſſion for life, or in reverſion for life, then every biſhop for his time may grant the office, becauſe it is a neceſſary office, and ought always to be full; ſo as when one dies there may be another officer immediately to execute the ſaid office, for the benefit of the king's ſubjects: and when it hath been uſually granted for life in reverſion, as here it is found it hath, there is not any prejudice to the ſucceſſor, for he takes not any matter of profit from him, and he hath an officer who is neceſſary; and the caſe cited of the *Biſhop of Sarum* well warrants it: and in the caſe of the *Biſhop of Chicheſter v. Freedland* (*a*), it was held, that the grant of an ancient office by the biſhop, without increaſing of a new fee (it being confirmed by the dean and chapter), was good againſt the ſucceſſor. But the doubt there was, Whether the addition of a new fee made all the grant, or only the additional fee, to be void? Wherefore they all reſolved in this caſe, that this grant in reverſion, as it is confirmed, is good, and adjudged it for the plaintiff. 9. *Co.* 97. *Sir George Reynolds's Caſe.* 5. *Co.* 2, & 3.

The office of regiſter of a dioceſe, or any other office uſually granted for life in poſſeſſion or reverſion, may be granted in reverſion by every biſhop; and if confirmed by the dean and chapter, will bind his ſucceſſors.

Ante, 259.

Dyer, 150. 2. And. 118. Hob. 148. 4. Mod. 30. 1. Burr. 219. 224. Dougl. 573.

(*a*) Ante, 47.

Seeles and Others, Priſoners.

CASE 12.

UPON a *habeas corpus* directed to the Keepers of THE PORTER'S LODGE, being the priſon for the Council of the marches of *Wales*, it being returned, that they were committed to him by virtue of a decree of the ſaid council, upon information againſt them, that the one of them inveigled the ſon and heir of *J. S.* being of the age of ſeventeen years, in the night and when he was drunken, to marry the ſiſter of another of the defendants: whereupon they were every of them ſeverally fined to the king, ſome of them to an hundred marks, ſome to forty pounds, and an hundred marks damages to the father, who was the proſecutor, and committed to priſon for a year, and until the ſaid fines paid, and the ſaid hundred marks damages ſatisfied to the ſaid *J. S.* and until they entered a recognizance for their good behaviour, and until the ſaid Court took further order.

A criminal information will lie for inveigling an infant from his father's houſe, and inducing him to marry, &c.

March. 32. 5. Mod. 221. Comb. 456. 2. Keb. 432. 3. Keb. 105. 1. Lev. 257. 1. Sid. 387. Carth. 384. 5. Mod. 221. 1. Burr. 606.

Skin. 81. Raym. 259. 3. Com. Dig. 426.

IT WAS ALSO returned, that they were committed by virtue of an order from the lords of the council.—And this return WAS HELD utterly inſufficient for the laſt part, becauſe it was not mentioned what was the order of council.

Commitment for refuſing to obey *an order* muſt ſtate what the order was.

It

A commitment to "remain till "further order" is bad.

It was alſo moved by GRIMSTON, That the return was ill, to award to priſon, to remain there until further order taken; which is utterly uncertain.

Poſt. 579.—1. Lev. 230. 2. Hawk. P. C. 186.

Qu. If the courts in *Wales* have cognizance of clandeſtine marriage?

It was likewiſe doubted, Whether the court of marches might meddle with a *clandeſtine marriage* to puniſh it, being a mere ſpiritual act?

No damages can be given on an indictment.

As alſo about the ſentence for damages to the party, although it be within the expreſs words of the inſtructions, &c.

Ante, 318. 531. 552. 595. 2. Hawk. P. C. 300.

Whereupon day was given until *Octabis Michaelis*; and in the interim the parties were bailed.

Michaelmas

15. Car. 1. In the King's Bench,

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Robert Berkley, *Knt.*

Sir John Banks, *Knt. Attorney General.*

Sir Edward Littleton, *Knt. Solicitor General.*

Facy *againſt* Lange.

CASE 1.

Trinity Term, 7. *Car.* 1. *Roll* 1549.

ATTACHMENT upon a prohibition. The plaintiff declares, That the defendant ſued him in court chriſtian, after a prohibition delivered, for tithes which were diſcharged *per modum decimandi.*

In an *attachment* upon a *prohibition*, the party ſhall recover damages and coſts againſt the party for proceeding after the *prohibition* awarded.

The firſt iſſue was, That he did not ſue after the prohibition delivered:

The ſecond upon preſcription: and both found for the plaintiff; and damages and coſts given by the jury.

MAYNARD now moved, that neither damages nor coſts ought to be aſſeſſed; but the party is only finable to the king for the contempt of proſecuting his ſuit, &c.

But upon a judgment in the common pleas upon adviſement and ſearch of ancient precedents, where the ſuit being continued in the ſpiritual court after a prohibition delivered, an attachment iſſued upon the prohibition; and becauſe thereby the party was damnified, and put to his ſuit of attachment, which was found to be ſued, the party there recovered damages and coſts.

THE COURT therefore here unanimouſly agreed, that the party ſhall have his damages and coſts found by the jury; and rule was given for judgment to be entered accordingly, unleſs cauſe, &c.

See 8. & 9. Will. 3. c. 11.

Jones, 447.
1. Roll. 516. 575.
2. Jones, 128.
3. Levinz, 360.
10. Mod. 274.
1. Vent. 348.
2 Bac. Abr. 2.
Ld. Ray. 342.

Barfoot *againſt* Norton.

CASE 2.

Trinity Term, 15. *Car.* 1. *Roll* 1227.

PROHIBITION for ſuing for divers kinds of tithes, *et inter alia* for HONEY, ſurmiſing it was not payable *quia volatilia*; and it was thereupon demurred.

The honey and wax of bees in the hive are tithable.

GRIMSTON now moved, that by law tithes are to be paid for honey; as appears in *F. N. B.* 31. g. and *Linwood, fol.*

Ante, 404.
F. N. B. 51.

ALL THE COURT was of that opinion; and conſultation was awarded, unleſs cauſe, &c.

S.C. Jones, 447.
1. Rol. 635.
Co. Ju. Ecc. 707.
3. Com. Dig. 99.

Moor, 599. *Sed vide* 1. Roll. 651. pl. 5.

North *againſt* Wingate.

CASE 3.

Trinity Term, 15. *Car.* 1. *Roll* 973.

ERROR of a judgment in the common pleas in debt upon the 1. & 2. *Phil. & Mary*, c. 12. for taking tenpence for a diſtreſs, where by the ſtatute he ought to take but fourpence, unleſs in places

In debt on a penal ſtatute for a *certain penalty*, the plaintiff ſhall have damages and coſts, and the judgment ſhall be *in miſericordia*.

Jones 447. 1. Roll. Ab. 516. 574. Cro. Jac. 70. Noy, 62. Carth. 230. Salk. 206. Bull.

March. 56. 61. N. P. 333.

NORTH *against* WINGATE.

3. Lev. 374. 1. Vent. 133. Skin. 363. 1. Ld. Ray. 172. 2. Com. Dig. 542. 558. 2. Hawk. P. C. 378, 379. 3. Burr. 1723. 4. Burr. 2490. Term Rep. C. B. 31.

places where it is otherwiſe accuſtomed, *ſub pœnâ foriſfacturæ* five pounds. The defendant pleaded *non debet*; and the jury found, *quòd debet* the ſaid five pounds, and aſſeſſed damages twopence, and coſts 53s. 4d.: and the Court increaſed the coſts to ſeven pounds; and judgment given, that he ſhould have writ for the ſaid five pounds, and the ſaid damages and coſts, and that the defendant be *in miſericordiâ*. And of this judgment error was brought and aſſigned by

GRIMSTON, FIRST, That no damages or coſts ought to be given, becauſe it is a penal ſtatute; and a penalty being given by the ſtatute, he ought not to have any coſts and damages but the penalty only: and for proof thereof he cited *Pilford's Caſe*, 10. *Co.* 115. that where a ſtatute gives ſingle, or double, or treble damages, and doth not mention any coſts, there the plaintiff ſhall not recover any coſts (*a*).

THE SECOND ERROR aſſigned, Becauſe the judgment is *idee in miſericordiâ*, where it ought to have been *ideo capiatur*.

But ALL THE COURT reſolved, that the judgment was good, and ought to be affirmed: for to THE FIRST, when a ſtatute gives a penalty certain, and gives an action of debt, there if the defendant doth not pay it upon demand, but enforceth the party into a ſuit, and he recovers by action of debt, *ex conſequenti* he ſhall recover his damages, becauſe he did not pay the duty due by the ſtatute upon demand; and he ſhall alſo recover coſts, for otherwiſe he ſhould be at a loſs to expend more than he recovers, which the ſtatute never intended. But where the duty is uncertain, as to recover treble damages, as upon the ſtatute of waſte, or upon the 2. *Edw.* 6. c. . for not ſetting forth of tithes, there the duty being uncertain, the ſtatute intends to give the treble value only, and not the coſts; and ſo are the precedents in *Coke's Entries*, 163. & 164. And as to the ſecond error, the judgment being in debt for non-payment, and not upon the ſtatute, the judgment ought to be *in miſericordiâ*.

1. Roll. Ab. 517.

Co. Lit. 257. b. Cro. Jac. 70. 538. 8. Co. 60. b.

(*a*) See 8. & 9. Will. 3. c. 11.

CASE 4.

Lee *againſt* Ruſſell.

Trinity Term, 15. *Car.* 1. *Roll* 691.

In DEBT on bond to accept a leaſe on requeſt, if to a PLEA of "*non requiſivit*" the plaintiff replies tender of a leaſe, *without ſaying of what lands*, and iſſue on the requeſt, this *aids* the defect in the replication.

ERROR of a judgment in the common pleas in debt upon an obligation, conditioned that if the obligor accepted a leaſe by indenture of ſuch lands upon the plaintiff's requeſt, and ſealed a counterpart thereof, that then the obligation ſhall be void.

The defendant pleads, that the plaintiff did not requeſt him to accept a leaſe.

The plaintiff replies, that he cauſed an indenture to be drawn of a leaſe, according to the ſaid condition, and to be ingroſſed, and a label to be affixed thereto, *cum ſerâ appenſâ*, and required and offered to deliver it to the defendant to accept thereof, and he refuſed.

Plowd. 230. Cro. Eliz. 825. Kitch. 238. 3. Co. 52.

The iſſue was upon the requeſt; and found for the plaintiff, and judgment given.

And now error brought and aſſigned by ROLLE, and by GODBOLT, *Serjeant*, *ore tenus*,

FIRST,

FIRST, That it was *cum ferâ labello annexâ*; and *fera* is no Latin word for *wax*, but ſignifies a lock.—*Sed non allocatur*; for it may be well intended for wax *ſecundum ſubjectam materiam.*

Words ſhall be conſtrued according to the ſubject matter.

SECONDLY, Becauſe he doth not aver that the lands mentioned in the indenture are the ſame lands in the condition.—But becauſe he had pleaded *quòd non requiſivit*; and he replied, that it was *ſecundum formam conditionis*; therefore if they were other lands, it ought to have been ſhewn on the part of the defendant, otherwiſe they ſhall be intended to be the ſame lands; the judgment was affirmed.

In debt on bond to convey lands in ſuch a deed mentioned, the identity of the lands need not be averred. Ante, 288. Cro. Jac. 139.

Anonymous.

CASE 5.

A WRIT OF ERROR was brought by the bail of a judgment given againſt the principal in the court of the city of *Weſtminſter*. The writ was, "*quòd tam in redditione judicii, quàm in redditione executionis, erratum fuit.*"

Capias without *ſcire facias* againſt bail is error. Cro. Eliz. 185. 2. Leon. 29. Palm. 567. 1. Com. Dig. 498.

The error aſſigned was, Becauſe a *capias* was awarded againſt the bail, and he taken in execution without any *ſcire facias* ſued againſt him; which was a manifeſt error.

But an exception was to the writ of error, Becauſe the bail cannot have a writ of error of the principal judgment;—which was agreed by THE COURT.

Bail cannot bring a writ of error on the principal judgment. Ante, 481. Poſt. 575.

But then the queſtion was, the record being removed, Whether he may have a writ of error, *quòd coram vobis reſidet?*—And thereof THE COURT doubted, and would adviſe.

1. Roll. 754. Yelv. 6. 2. Leon. 201. 1. Com. Dig. 498. 5. Com. Dig. 291.

Launder *againſt* Brooks and Others.

CASE 6.

EJECTMENT of lands in *Kent*, whereof *William Brooks* being ſeiſed in fee, holden *in ſoccage*, and of other lands holden *in capite*, by his will in writing deviſed the ſaid ſoccage lands to *Brooks* his baſe ſon, and the heirs of his body. The defendant pretended there is a cuſtom in *Kent* to deviſe lands in gavelkind holden in ſoccage. The ſole queſtion was, Whether there were ſuch a cuſtom, or no? for if not, the plaintiff hath good title: and if ſuch lands were deviſable by cuſtom before the 32. *Hen.* 8. c. 29. then the defendant hath good title.

A tenant in gavelkind by the cuſtom of *Kent* had a power of deviſing of ſoccage lands before the 32. *Hen.* 8. c. 29. S.C. 2. Sid. 154. F.N.B. 98. 198. 2. Bl. Com. 85. 3. Com. Dig. 435. Pow. on Dev. 5.

The defendant, to prove the cuſtom, ſhewed that lands in gavelkind are deviſable by cuſtom (*a*); and that lands in gavelkind may be *given* or *ſold* without the lord's licence (*b*).

WHITFEILD, *Serjeant*, ſaid, he interpreted the word "*given*" to be *by will*, and the word "*ſold*" to be *by deed*; and produced for evidence divers wills out of the Regiſters Offices in *Canterbury* and *Rocheſter*, of deviſes of lands by teſtament, in the times of the kings *Hen.* 6. *Edw.* 4. and *Hen.* 7. of ſeveral lands in ſeveral villages in *Kent*: and ſhews two verdicts, the one in 9. *Jac.* 1. where, in a trial at this bar, the title was found for the defendant, that it was a good cuſtom there; and the other verdict, 13. *Car.* 1. at the common pleas bar, where title was found for the now defendant, that the lands were deviſable by cuſtom: and there was a Book of Re-

(*a*) Fitz. Nat. Brev. 198. (*b*) Lambert, fol.

ports

LAUNDER *againſt* BROOKS and OTHERS.

Courts of law take notice only of the *general* and not of the *ſpecial* cuſtoms of GAVELKIND. Ante, 445.

Co. Lit. 110. 175. b. 1. Lev. 79. 2. Sid. 137. 2. Sid. 154. Ray. 76. Robinſon on Gavelkind, 42. 2. Bac. Ab. 644.

ports ſhewn, where in *Michaelmas Term* 41. & 42. *Eliz.* all the court of common pleas agreed, that ſuch a cuſtom was there; but they ſaid, this cuſtom ought to be pleaded, and that the land ſo deviſed was holden in ſoccage: for although the Court ſhall take cognizance of the cuſtom of gavelkind in *Kent* without pleading, yet of this ſpecial cuſtom to deviſe, &c. or that the lands are holden in ſoccage, or that the wife ſhall have the moiety for her dower, they ought not to take cognizance without ſpecial pleading, they being particular cuſtoms; but for the cuſtom of gavelkind it ſufficeth to ſhew, that it is in *Kent*, and of the nature of gavelkind, without pleading the cuſtom; for the Court takes knowledge what the cuſtom of gavelkind is.

But HEATH, *the King's Serjeant*, PORTER, TWISDEN, and DENN, did much endeavour to diſprove the ſaid evidence, and to ſhew, there was no ſuch cuſtom to deviſe gavelkind lands holden in ſoccage; and for proof thereof relied upon the YEAR-BOOK of 4. *Edw.* 2. "*Mortd'aunceſtor*," 39. that an aſſiſe of mortd'aunceſtor lies not of lands deviſable.

But ALL THE COURT reſolved to the contrary, that an aſſiſe of mortd'aunceſtor lies of lands deviſable, if it be true that his anceſtor died ſeiſed, unleſs it appears that the defendant claims by ſome other title; but if the defendant plead, that the land is by cuſtom deviſable, and was deviſed unto him, it is a good bar of the action.

SECONDLY, It was objected, That many wills were made of gavelkind lands, where generally the lands were in uſe, and in the hands of feoffees; and many precedents were of this kind.

THE COURT anſwered thereto, that the precedents ſhewn were deviſes of lands, without mentioning them to be in the hands of feoffees; and they conceived they might deviſe by the cuſtom: and a precedent was produced out of *Mr. Lambard*, of a teſtament of lands in gavelkind before the Conqueſt, &c.

But HEATH anſwered, it was an ill precedent, becauſe the huſband and wife deviſed; and it cannot ſtand with the law, that the wife ſhould join with the huſband.

And JONES, *Juſtice*, ſaid, that in *North-Wales* there is much land of this nature by cuſtom, deviſable by writing or without writing.

And they for the plaintiff ſhewed, that in the common pleas, after the trial was had in this court, there was another trial in the common pleas, 11. *Car.* 1. by the knights, eſquires, and gentlemen, who found for the now plaintiff, that there was not any ſuch cuſtom.

But it was thereto anſwered, in behalf of the defendant, that LORD FINCH ſhewed his diſlike of that verdict. And afterwards, 13. *Car.* 1. upon full evidence, a verdict was given for the defendant's title, that there was ſuch a cuſtom, and that the land was deviſable by cuſtom there.

AND AFTERWARD, the jury here going from the bar to conſider of this matter, *ſedente Curiâ*, the plaintiff was nonſuited.

1. Sid. 135.

Roe

Roe and Bond *againſt* Devys.

Case 7.

Trinity Term, 15. Car. 1. Roll

TRESPASS. The parties being at iſſue upon the *venire facias*, one *Samuel Sutton* was returned, and in the *diſtringas* he was likewiſe named *Samuel Sutton*; but upon the panel annexed by the ſheriff, he was named *Daniel Sutton*, of the ſame place, and returned and ſworn.

A miſtaken *Chriſtian* name in the panel is not amendable by 21. *Jac.* 1. c. 13.; but it may be amended by 8. *Hen.* 6. c. 12. and by common law.

Jones, 448. 1. Roll. Ab. 197. Cro. Eliz. 400. 466. Cro. Jac. 116. 396. 457. Cro. Car. 203. Hob. 28. 5. Co. 43. a. Strange, 1214. 1. Com. Dig. 321. Dougl. 114, 115.

This was aſſigned to ſtay judgment; but the ſheriff being examined ſaid, it was a miſpriſion in his clerk, who writ *Daniel* for *Samuel*; and the clerk being examined, affirmed as much, and that *Samuel Sutton* was ſworn and gave the verdict: and the juror *Samuel* being examined, affirmed he was the ſame perſon who was ſworn, and that his name was *Samuel*, and was of the ſame vill, and that there was not any known by the name of *Daniel Sutton* within the ſaid vill.

Wherefore by order of Court it was appointed to be amended, and made *Samuel* in the panel; for they held, that it was amendable as well by the 8. *Hen.* 6. c. 12. as by the common law, it being an apparent miſpriſion of the clerk. But the 21. *Jac.* 1. c. 13. doth not extend thereto, but only to *ſirnames* miſtaken, &c. which are to be amended, if by examination it may appear they be the ſame perſons who were returned. And the judgment was affirmed.

Reignald's Caſe.

Case 8.

ACTION FOR WORDS. Whereas he was deputy-clerk to one *Parker* for divers years, who was regiſter under ſuch an archdeacon, and received divers fees and profits of that office to render accompt; that the defendant having communication of him and of his office, and intending to deprive him of all his benefit thereof, and to cauſe him to incur the diſpleaſure of his maſter, the ſaid *Parker*, and of the ſaid archdeacon, who repoſed much truſt in him, ſaid of the plaintiff, "He is a baſe cozening knave; "he is a cheater, and hath cozened his maſter" (the ſaid *Parker innuendo*).

To accuſe a ſervant, who is employed in an office of truſt, of having "cozened "his maſter," is actionable; for it ſhall be intended in his office. Ante, 480. 552. a. Hob. 76. Cro. Jac. 504. 1. Com. Dig. 179. 2. Term Rep. 110.

The defendant pleaded not guilty: and it was found againſt him, and damages 30l.

CHARLES JONES now moved in arreſt of judgment, that theſe words are not actionable: for he doth not ſay that he cozened him concerning his office; and it may be intended, he cozened him in ſome other matter beſides his office, and then the action lies not.

But ALL THE COURT (*abſente* BRAMPSTON) held, that the action well lay; for it ſhall not be intended but that the words were ſpoken concerning the execution of the office, where the communication was concerning the office. Wherefore it was adjudged for the plaintiff.

Proctor

Case 9.

Proctor *againſt* Chamberlaine and Two Others.

In debt againſt three executors, if one of them on ſummons confeſs the action, and judgment be *de bonis teſtatoris* againſt all, but *ſi non de bonis propriis* againſt him who appeared, the others cannot be taken in execution on a *ſcire facias*, although a *devaſtavit* be found and two *nihils* returned. Ante, 529. 527. Poſt. 603.

5. Co. 32. a. 8. Co. 61. b. Co. Lit. 126. b. Cro. Jac. 64. 1. Salk. 310. 2. Com. Dig. 256.

ERROR was brought of a judgment in the common pleas in debt, againſt them as executors of one *Chamberlaine*. The one of the three executors appeared upon the ſummons, and confeſſed the action; and judgment given, *quòd recuperaret debitum* againſt the three executors; and that he ſhall have execution againſt the three executors *de bonis teſtatoris* in their hands, *ſi tantum*, &c. and the damages *de bonis propriis* of him who appeared, and *miſericordia* againſt all.

And hereupon a *ſcire facias* iſſued into *London*, where the action was laid, *et ſi conſtare poterit per inquiſitionem*, that they have waſted the goods, *quòd tunc ſcire faciat* to them to anſwer the debt.

Upon a *devaſtavit* found by the inquiſition and returned, a *ſcire facias* was taken forth, and on two *nihils* returned, judgment was given and execution iſſued againſt them, and *Proctor* was taken in execution; and upon this judgment the writ of error was brought.

The FIRST ERROR aſſigned was, Becauſe the appearance was upon the ſummons, and not upon the grand diſtreſs, and therefore out of the ſtatute of 9. *Edw.* 3. c. 3.

SECONDLY, Becauſe it is "*miſericordia*" againſt the three, where two of them never appeared, and againſt him who appeared no *miſericordia* ought to be, becauſe he came in upon the day of ſummons.

IT WAS RESOLVED, for theſe and other reaſons, that the party taken in execution ſhould be diſcharged.

Case 10.

Terrey's Caſe.

In an indictment on a public ſtatute, a *variance* in that which is inſerted by words of *inducement* only is not fatal.

TERREY, a merchant, was indicted upon the 33. *Hen.* 8. c. 1. of *falſe tokens*, becauſe that he by a *falſe note*, in the name of *John Dubois*, obtained into his hands a wedge of ſilver of the value of two hundred pounds; and found guilty.

CHARLES JONES and HOLBORN took exception againſt the ſaid indictment for *variance* therein in ſeveral words from the ſtatute.

But becauſe there was not any recital, nor miſ-recital of the ſtatute, but it was only an *inducement* to the ſetting down thereof, and not in any point material, THE COURT reſolved it to be good enough:

A perſon convicted on 33. *Hen.* 8. c. 1. may be *fined* and *pilloried*.

(*a*) 3. Inſt. 133. 2. Hawk. P. C. 344.

And thereupon it was adjudged, that he ſhould ſtand upon the pillory in *Cheapſide*, and upon the pillory in *Cornhill*, near to the Exchange, upon the *Saturday* following, and ſhould pay fine to the king of five hundred pounds (*a*), and be impriſoned during the king's pleaſure, and be bound with good ſureties for his good behaviour.

See 30. Geo. 2. c. 24.

Hilary

Hilary Term,

15. Car. I. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Littleton, *Knt. Solicitor General.*

Memorandum. CASE I.

IN this Vacation SIR GEORGE VERNON, *Knight*, of the county of *Cheſter*, firſt made Baron of the exchequer, and afterwards one of the Juſtices of the common pleas, a man of great reading in the ſtatutes and common law, and of extraordinary memory, died at *Serjeants-Inn*, in *Chancery-lane*, on the 16th *December* 1639; and upon the 18th *December* following was buried in the *Temple* church, *London*. Serjeant Foſter ſucceeds Mr. Juſtice Vernon.

And ROBERT FOSTER, *Serjeant*, being of the *Inner-Temple*, was ſworn Juſtice in his place on the 3d *January* 1639.

Upon the 14th of *January* 1639, THOMAS LORD COVENTRY, Lord Keeper of the Great Seal, died about four o'clock in the morning. He was a pious, prudent, and learned man, and ſtrict in his practice, being Lord Keeper for fourteen years and upward: he died in great honour, and much lamented by all the people. Lord Keeper Coventry dies,

And afterwards, upon the 18th *January* 1639, SIR JOHN FINCH, Chief Juſtice of the common pleas, and chancellor to the queen, was made Lord Keeper of the Great Seal, and ſworn the ſame day at *Whitehall* into the office of Lord Keeper, and one of the Privy-council: and the next day, being *Saturday*, ſealed divers writs at the houſe of SERJEANT FINCH, in *Chancery-lane*; and upon the *Tueſday* following ſealed again; and upon *Thurſday* the 23d of *January* he rode in great ſtate to *Weſtminſter*, the Lord Treaſurer and the Earl of *Mancheſter* riding on each ſide of him, and accompanied by the Earl Marſhal, the Admiral, the Earl of *Strafford* Lieutenant of *Ireland*, and by divers other Earls, Viſcounts, and Barons, and all the Juſtices of both Benches, and Barons of the Exchequer, and the Gentlemen of the four Inns of Court, and divers others attending upon him. and is ſucceeded by Sir John Finch.

Upon the ſame day, being the firſt day of the Term, SIR EDWARD LITTLETON, *Solicitor* (who had his writ to be ſerjeant the ſame day, to the intent he ſhould be made Chief Juſtice of the common pleas), appeared in *Chancery* and was ſworn Serjeant; and upon the *Saturday* following performed all the ceremonies of a ſerjeant, as well in his apparel as otherwiſe, and gave rings, *quorum inſcriptio fuit* * * * * *. And BRAMPSTON, *Chief Juſtice*, made a ſhort ſpeech, declaring to him the duty of a ſerjeant, but did not much inſiſt thereon, becauſe he was to be Chief Juſtice of the common pleas. Sir Edward Littleton made a Serjeant at Law. Poſt. 567. 600. S. C.

CASE 2.

Dawſon *againſt* Lee.

Michaelmas Term, 15. *Car.* 1. *Roll* 585.

On "*nul tiel record*" to a plea of outlawry, if the defendant fail to bring in the record, *final judgment* ſhall be given, and not a *reſpondeat ouſter*.

Co. Lit. 128. b. Cro. Jac. 484. Yelv. 36. Dyer, 228. Salk. 329. 8. Co. 142. Ld. Raym. 1014. 1. Comp. Prac. 192. 3 Bac. Ab. 764.

DEBT upon a contract. The defendant after imparlance pleaded outlawry in bar. The plaintiff ſaith, "*nul tiel record.*" And the defendant had a day to bring in the record, and failed therein.

The queſtion was, What judgment ſhould be given? For HODDESDEN ſaid, that in the time when *Tanfeild* was their Judge, they held, that if the defendant after imparlance had pleaded outlawry, and, upon "*nul tiel record*" pleaded, had failed of the record, judgment ſhould be abſolutely given, and not a *reſpondes ouſter*.

And BERKLEY and MYSELF conceived it ſhould be an abſolute judgment, foraſmuch as he had pleaded in bar and did not anſwer over. But BERKLEY ſaid, if the plaintiff would pray only that he ſhould be awarded to anſwer over, he might ſo pray; for it is his delay only and no error. But the plaintiff, by his attorney, prayed to have it abſolutely; and ſo it was awarded, unleſs other cauſe ſhould be ſhewn the *Wedneſday* following. And, after dinner in *Serjeants-Inn*, BRAMPSTON, *Chief Juſtice*, and JONES (who were that day in the ſtar-chamber) being informed of this caſe, were of the ſame opinion: and ſo were DAMPORT, *Chief Baron*, and ALL THE OTHER JUSTICES AND BARONS, to whom it was propounded.

CASE 3.

Stevens' Caſe.

If principal be found guilty of grand larceny, and has his clergy allowed, or be burned in the hand, an acceſſary convicted of receiving ſuch principal does not forfeit his land or goods.

Foſter, 73. 2. Hawk. 638. 3. Com. Dig. 383. 3. Bac. Ab. 757. 763.

STEVENS and *Alice* his daughter were indicted at the ſeſſions of the peace in the county of *Cambridge* before the juſtices of peace there, Becauſe the ſaid *Alice* feloniouſly ſtole a rake and a fork of the value of three ſhillings, and a rope of the value of eighteen-pence; and that *Stevens* the father, knowing thereof, received and comforted the ſaid *Alice*, and ſo was acceſſary. And hereupon they were arraigned, and pleaded *not guilty*. By means of one *Spice*, the under-ſheriff, who returned two of his ſervants to be of the jury (as appeared by affidavit of ſome of the jurors), they were found guilty; and *Alice* the principal, becauſe the goods were under value, and according to the ſtatute, was awarded to be burned in the hand, and that ſhe ſhould forfeit all her lands and tenements, goods and chattels: and againſt the ſaid *Stevens* judgment was given (becauſe he had prayed his book, and was returned *legit ut clericus*), that he ſhould be burned in the hand; and ſo it was done immediately to them both; and that he ſhould forfeit all his lands and goods: and preſently the under-ſheriff ſeized the lands and alſo the goods and chattels of the ſaid *Stevens*, being of the value of five hundred pounds; and returned into the exchequer, that he ſeized his goods only, to the value of three ſhillings (as it was informed at the bar). And upon this judgment *Stevens* brought a writ of error.

GRIMSTON, being of counſel with the plaintiff, aſſigned error in the judgment.

And

And BERKLEY and MYSELF being only in court, upon reading of the record, held it to be manifeſt error; for the principal not being attainted but diſcharged, by burning in the hand only according to the ſtatute, the acceſſary ought to have been diſcharged without any burning in the hand, and without being put to his book; for where a man is principal, and another is acceſſary to him after the fact, and both of them be convicted, if the principal prays his clergy and hath it allowed, and be burnt in the hand, becauſe he is returned *legit*, *&c.* the acceſſary is to be diſcharged without being put to his book; for he ought not to be condemned but where the principal is *attainted*, and not where he is *convicted* only, and had his clergy; and ſo is the common experience and practice.

STEVENS' CASE.

3. Inſt. 114. 139. 4. Co. 43. b. 11. Co. 35. a.

ALSO the judgment is erroneouſly given, becauſe it is that he ſhall forfeit his lands and tenements after ſuch conviction and clergy allowed; wherefore the judgment was reverſed. And the clerk of the crown was appointed to draw an information upon this miſdemeanour for the procuring of the ſaid *Stevens* in ſuch an undue manner to be convicted.

Crawley's Caſe.

CASE 4.

CRAWLEY being brought to the bar upon a *habeas corpus*, directed to the mayor of *St. Alban's*, being in gaol there, it was returned upon the writ, that he was committed to the gaol by the juſtices of the peace of the ſaid liberty, at the ſeſſions of the peace holden 11th *July* 1639, till he ſhould obey an order of taking the office of conſtable upon him; for that he being an inhabitant within the hundred of *Caſho*, within the liberty of *St. Alban's*, had refuſed to execute the ſaid place.

The ſeſſions cannot commit a perſon for refuſing to take upon him the office of conſtable; but they may indict and *fine*, and commit for the non payment of the fine.

And becauſe it was informed on the part of the ſaid *Crawley*, that he denied to be within the liberty of *St. Alban's*, but affirmed that he was within the county of *Hertford*, out of the ſaid liberty,

Co. Ent. 5. a. 5. Mod. 130. 1. Salk. 175. Skin. 669. Comb. 416. Stra. 920. 1150. 4. Com. Dig. 171. Ld. Ray. 69. Fitzg. 192. 2. Hawk. P. C. 102. 1. Eſp. Dig. 414.

ALL THE COURT held, that he was unjuſtly committed, becauſe they ought not to have committed him when he denied to be conſtable, eſpecially pretending that he was not within the liberty; but ſhould have cauſed him to be indicted upon this refuſal, and, if he were found to be within the liberty, ſhould have aſſeſſed a good fine, and then have committed him for that cauſe. *Vide Greiſley's Caſe* (*a*). But as it is now returned, the impriſonment was not lawful: wherefore the ſaid *Crawley*, by the opinion of the whole Court, was abſolutely diſcharged without any bail.

(*a*) 8. Co. 38.

Memorandum.

CASE 5.

UPON *Monday* 27th *January* 1639, SIR EDWARD LITTLETON and ROBERT FOSTER appeared at the common pleas bar, and were placed in the midſt of the bar; and SIR JOHN FINCH, Lord Keeper of the Great Seal, came into the common pleas, and made a long and eloquent ſpeech to them both, ſignifying the king's pleaſure to make SIR EDWARD LITTLETON Chief Juſtice of the common pleas, for his good and long ſervice, and his certain knowledge of his abilities to ſerve him; and the ſaid ROBERT FOSTER to be

Sir Edward Littleton and Mr. Robert Foſter made Judges of the Common Pleas.

MEMORANDUM. Puiſne Judge there, for his good opinion which he conceived, and the good report he had heard of him: and afterwards both of them made ſeveral ſpeeches, giving thanks to the king, and ſignifying their willingneſs of endeavouring to perform their ſervice to the king and his people, according to the utmoſt of their ſkill and abilities in their ſeveral places.

CASE 6.

Parker *againſt* Edith Blecke.

Hilary Term, 13. Car. 1. Roll 1002.

In the ſale of copyhold lands by commiſſioners of bankrupts, the eſtate is in the bargainee before admittance, and the owner is no copyholder after the bargain and ſale inrolled; therefore if the bankrupt die between the ſale and the admittance, his wife ſhall loſe the advantage of a cuſtom, that "*the wives of* "*copyholders dying tenants of* "*the manor* ſhall "be endowed." Ante, 550.

1. Atkins, 96.
1. Com. Dig. 541.
2. Com. Dig. 501. 528.
2. Bac. Ab. 153.
Cooke's Bank. Laws, 217.
Cowp. 481.
1. Term Rep. 600.
3. Term Rep. 470.

TRESPASS. Upon not guilty pleaded, a ſpecial verdict was found, that the land was copyhold land of inheritance of the manor of *Cheltenham*, in *Glouceſterſhire*, whereof one *Arthur Blecke*, late huſband of the defendant, was ſeiſed in fee; within which manor there is a cuſtom, amongſt others, that if a copyholder ſeiſed in fee of a copyhold tenement dieth, having a wife at the time of his death ſurviving him, that ſhe ſhall have and hold the ſaid copyhold land during her life, and for twelve years after; and they found the ſtatute of 13. *Eliz.* c. 7. of Bankrupt, and the ſtatute of 1. *Jac.* 1. c. 15.: and that upon complaint of the creditors a commiſſion iſſued upon thoſe ſtatutes, directed to WARREN and ſix other commiſſioners, to enquire whether he were a bankrupt; and if they found him to be a bankrupt, that they, or three of them, whereof the ſaid WARREN to be one, ſhould execute the commiſſion according to the ſtatutes. That hereupon the ſaid WARREN and three others, upon complaint of the creditors, examined the matters and adjudged him to be a bankrupt; and found that he was ſeiſed in fee of the ſaid copyhold, which was appriſed to be ſold to the value of ſix hundred pounds: that they by indenture, 5th *April* 10. *Car.* 1. inrolled within the ſix months, reciting the cauſes wherefore they adjudged him to be a bankrupt, bargained and ſold the ſaid copyhold land to *Arthur Parker* and *William Sothern* and their heirs, for ſix hundred pounds, paid and ſecured to be paid, for the uſe of the creditors of the ſaid bankrupt. And they find a private act of parliament, made 1. *Car.* 1. whereby the cuſtoms of the ſaid manor are cited and eſtabliſhed; and amongſt others this cuſtom is mentioned and confirmed, "That the wife of the copy-"holder ſhall have dower, and may have a jointure aſſigned for her "life:" AND THAT "a copyholder of inheritance may make a "grant for his life and twelve years after:" PROVIDED, "That "all women now living, and late the wives of any the copyholders "of the ſaid manor, *dying tenants*, and all the now wives of any the "copyholders of the ſaid manor, ſhall and may enjoy the cuſtomary "lands of their now or late huſbands, and be tenants for their lives "and twelve years after, as if this act had never been made." And in the end of the ſaid act there is a general clauſe: BE IT ENACTED, "That all cuſtoms and uſages heretofore uſed and al-"lowed within the ſaid manor, concerning the having or enjoying "of any the ſaid cuſtomary lands or tenements, by any widow of "any cuſtomary tenant of the ſame manor, or by any after-taken "huſband of ſuch widows, or the heir or heirs of ſuch wife here-"after

" after taking huſband, or concerning the deſcending of any ſuch " lands to any other perſon, or in any other manner or form than " is before expreſſed, ſhall be utterly void and of none effect: and " that all other lawful uſages and cuſtoms heretofore uſed within " the ſaid manor, which are not repugnant and contrary to the true " meaning of this act, ſhall be and remain good and effectual, and " are and ſhall be ratified by this act." They further find, that at a court baron of the manor, on the 1ſt *April* 12. *Car.* 1. it was found by the homage, that the ſaid *Edith* ſurvived her ſaid huſband, and ought to enjoy the ſaid tenements in which, &c. for term of life of the ſaid *Edith*, and for twelve years after: and that upon a preſentment afterwards, *viz.* the aforeſaid 1ſt *April* 12. *Car.* 1. and before the admiſſion of the ſaid *Alexander Parker* and *William Sothern* into the lands, *in formâ prædictâ factâ*, the aforeſaid *Edith* was admitted tenant of the tenements aforeſaid, *in quibus, &c. ſecundum conſuetudinem manerii prædicti quodque virtute admiſſionis prædictæ prædicta* EDITHA, &c. *tempore quo*, entered, &c.

And this was very well argued at the bar by GLYNN, *for the plaintiff*, and by MORETON, *for the defendant*; where two points were inſiſted upon:

FIRST, Whether by the bargain and ſale made by the commiſſioners, by virtue of the ſtatute of bankrupts, the eſtate of the copyholder was veſted in the bargainee before admittance, although he might not enter before admittance, for then the ſaid *Arthur Bleeke* did not *die tenant*; and ſo is not within the cuſtom that his wife ſhould have widow's eſtate? 1. Roll. Ab. 508. Cro. Jac. 3'. Freem. 516.

SECONDLY, Admitting he died tenant, and the widow had ſuch an eſtate veſted in her, whether the vendees, by the bargain and ſale to them before made, ſhall not afterwards deveſt the eſtate of the wife by relation, and then the plaintiff hath a good title? 5. Burr. 2783.

BERKLEY and MYSELF argued, that the bargain and ſale binds the copyholder and bars his eſtate, and that he is no copyholder after the bargain and ſale enrolled (*a*): and the bargainee by the ſtatute is only barred to take the profits until admittance, which is for the lord's benefit in reſpect of the fine due to him thereupon. SECONDLY, We held, when the bargainee is admitted by the lord, it ſhall veſt in the bargainee, and ſhall have relation to the bargain and ſale, and ſhall deveſt the eſtate which the wife claimed by the cuſtom; as in the caſe of 7. *Edw.* 6. *Brook, title* "*Inrolments*," where one jointenant bargains and ſells, and before the inrolment the other dies, and afterward the deed is inrolled within the ſix months, yet the moiety only paſſed: and it is like the caſe where one bargains and ſells by indenture and takes wife and dies, and afterward the deed is inrolled within ſix months, the wife ſhall not have her dower; and ſo the caſe 22. *Eliz.* where mortgagee dies, his heir being in ward to the king, the condition is afterward performed, and the wardſhip ſhall be deveſted. Judg. Ref. 161. 2. Com. Dig. 528. Ante, 283. Co. Lit. 186. Ante, 217.

JONES and BRAMPSTON, *Juſtices*, doubted of the point, until they ſaw that the record finds the act to be particularly, that "ſhe

(*a*) *Vide* 27. Hen. 8. c. 16. and Bac. Abr. 277.

PARKER *againſt* BLEEKE. Judg. Ref. 161.

"ought to be the wife of a tenant:" and it is not intended, that after the ſale of the copyhold he ſhould die tenant; and he did not die tenant, becauſe the bargain and ſale took his eſtate from him, and ouſted him of the copyhold. THEY therefore agreed, judgment ſhould be entered for the plaintiff.

CASE 7.

Bathell's Caſe.

Hilary Term, 9. *Car.* 1. *Roll* 958.

Judgment in *Wales* need not ſay "*magnæ* "*ſeſſionis*;" and a *venire* in the name of "*A. B.* "*late ſheriff*," is good. Ante, 189. Poſt. 572. Carth. 56. Stra. 316. Dougl. 6.

ERROR of a judgment in the grand ſeſſions, before the Juſtices in the county of *Flint*. Divers errors were aſſigned and overruled in *Michaelmas Term* laſt; and now two errors only were inſiſted upon:

FIRST, That the judgment was, *coram juſtitiariis in comitatu* FLINT; and he doth not ſay, *magnæ ſeſſionis in comitatu* FLINT.—*Sed non allocatur*; for there are many of their records as well the one way as the other, and good both ways.

SECONDLY, Becauſe the *venire facias* was returned *per* THOMAM HAMOND *militem*, *nuper vicecomitem* of the ſaid county; ſo it was not returned by the ſheriff, but by one who was late ſheriff: and it appears not that he was ſheriff at the time of the panel made, for he ought to have ſubſcribed his name, THOMAS HAMOND *vicecomes*; which error is not aided by any ſtatute.—*Sed non allocatur*: for although the writ be returned by *J. S.* the ſheriff, at the time of the grand ſeſſions, when the ſaid action was tried, as a writ delivered to him by the ſaid *Thomas Hamond* his predeceſſor, *in exitu ab officio ſuo*, with this return indorſed; yet it might be very well intended, that the panel was made and annexed in the time when he was ſheriff: and this addition, THOMAS HAMOND *nuper vicecomes*, is ſufficient proof when he is diſcharged of his office. Whereupon the judgment was affirmed.

See 21. Jac. 1. c. 13. and 20. Geo. 2. c. 37.

CASE 8.

Ireland *againſt* Lockwood.

Trinity Term, 15. *Car.* 1. *Roll* 1181.

An action lies for laying of a taylor that he cheated in his trade, *per quod* he loſt divers cuſtomers. Ante, 552. 1. Roll. Ab. 545. 2. Roll. Ab. 688. 3. Saund. 73. Jones, 450. 1. Sid. 343. Cro. Jac. 502.

ERROR upon a judgment in *Bath* in an action on the caſe for words. WHEREAS the plaintiff was a taylor, and uſed and exerciſed the trade of a taylor in *Bath*, and was a freeman of the ſaid town, and had divers cuſtomers in the county of *Wilts*, who uſed to employ him in his trade; that the defendant at *Bath*, within the juriſdiction of that court, ſaid of him, that "He cheated in his "trade," and other ſuch words, much ſlandering him in his trade; by which means he loſt divers of his cuſtomers in *Bath*, and in the county of *Wilts*; and they withdrew themſelves from him, to his damage, &c.

The defendant pleaded not guilty; and found againſt him, and damages aſſeſſed to one hundred marks, and judgment for the plaintiff: and error thereof brought and aſſigned, that the words were not actionable.

But IT WAS CLEARLY HELD, that they were actionable.

GRIMSTON

GRIMSTON then moved, that the jurors in *Bath*, being within a private jurisdiction, ought not to have assessed damages for the loss of his customers in the county of *Wilts*.

The jury in an inferior court may find matter that is only incidental to the issue, although done out of the jurisdiction.

BERKLEY, *Justice*, much insisted upon it, that for this cause the judgment was erroneous, as it was resolved in the case, where an *assumpsit* brought in *Windsor court* by one within the jurisdiction thereof, that *J. S.* upon a valuable consideration, did promise to bring to him so many loads of billets from *Hedisset*, in the county of *Bucks*, to *Windsor*. After verdict, upon *non assumpsit* pleaded, and found and adjudged for the plaintiff, the judgment was reversed, Because, it being a private jurisdiction, they have no authority to inquire of any matter out of the same.

1. Roll. Ab. 545. 1. Sid 95. 1. Saund. 73. T. Jones, 103. 230. 3. Keb. 677. 1. Vent. 28. Ld. Raym. 796. 2. Com. Dig. 612. Cowp. 18. 1. Term Rep. 151.

JONES, BRAMPSTON, and MYSELF, agreed that case to be law; but we held, that this is only an allegation in respect of damages, for the increase of them, which they may inquire of in any place whatsoever: wherefore the judgment was affirmed.

Bulley *against* Hubbins.

CASE 9.

In an action on a promise to pay when the plaintiff returned to *England*, it must be expressly averred that he gave notice to the defendant of his return.

ERROR of a judgment in the court of THE MARSHALSEA, in an action upon the case upon a promise, at the parish of *Saint Clement's Danes*, within the jurisdiction of that court, in consideration of such a sum received, that he would pay him such a sum when he returned into *England* from *Hamborough* (being a place beyond the seas); and alledges, that he such a day went over sea to *Hamborough* aforesaid, and returned such a day to the parish of *Saint Clement's Danes*, and that he demanded the money, and the defendant had not paid. After *non assumpsit* pleaded, verdict and judgment for the plaintiff, error was brought and assigned,

Hob. 68. Cro. Jac. 57. 150. 1. Roll. Ab. 469 *con.* 1. Lutw. 379.

FIRST, Because he doth not alledge, that he gave notice to the defendant of his return.—And although it be alledged, that the defendant, *habens notitiam inde*, and upon such a day requested, had not paid, yet IT WAS HELD clearly, that the declaration was insufficient for this cause, for he ought to have alledged express notice, and shewn the day and place of such notice given.

An inferior court cannot hold plea of matters out of its jurisdiction.

SECONDLY, Because it is brought of an act to be done at *Hamborough*, out of the jurisdiction of the marshal's court, being a private jurisdiction;—which was held also to be a manifest error: for which causes the judgment was reversed.

Cro. Jac, 503. 5. Com. Dig. 160. Cowp. 18. 1. Term Rep. 151.

Scavage *against* Hawkins.

CASE 10.

A *declaration* in debt for rent on a lease for years, stating that it was made by tenant in tail, and that the reversion descended to the plaintiff in fee, *quære* if it must

ERROR of a judgment in debt upon a lease for years. The error assigned was, Because the plaintiff in debt counts, that his father was seised in tail, and made that lease for years, rendering rent, and died seised of the reversion, which descended to him as son and heir of his body; and doth not shew the beginning of the said estate, which generally ought to be set forth where he claims by a particular estate (otherwise it is where he counts of a seisin in fee).—But because this was in *a count*, and not in *a bar*, is sufficient, without shewing commencement of the estate in tail; but in *a bar* or in *an* be shewn. Ante, 103. 138. 575.—Jones, 453. Co. Lit. 303. Cro. Eliz. 18. 407. Salk. 562. Comb. 27. 472. 476. Yelv. 147. Carth. 444. 2. Mod. 70. 4. Mod. 419. Ld. Ray. 332. 5. Com. Dig. 78. Cowp. 682. Dougl. 158, 159. 666.

SCAVAGE *againſt* HAWKINS.

nor in *an aveury*, and there were produced precedents out of the common pleas that ſuch counts are uſual there, it was therefore held to be no error, and the judgment was affirmed. 21. *Hen.* 6. *pl.* 26. 34. *Hen.* 6. *pl.* 48. 2. *Edw.* 4. *pl.* 11.

CASE 11.

Bryan *againſt* Wikes.

A variance in the ſtyle of an inferior court between the entry on the roll and the return on the proceſs, is immaterial. Ante, 570.

Cro. Jac. 114. 331. Cowp. 178. 474. 1. Term Rep. 239, 240.

ERROR of a judgment in *Leiceſter*, in an action on the caſe for words.

THE FIRST ERROR aſſigned by *Babington* was, Becauſe the entry of the court was, "PLACITA *coram* J. S. *Majore, et* JOH. CHAPMAN, *Recordatore, et* J. D. *et* J. N. *Aldermannis burgi prædicti ſecundum conſuetudinem burgi prædicti, &c.*" and the plaint being entered, upon ſummons, a *non eſt inventus* was returned at a court holden *coram dicto* J. S. *Majore, et* J. N. *et* J. D. *Aldermannis, &c. ſecundum conſuetudinem burgi prædicti, &c.* omitting the Recorder, which BABINGTON alledged to be error, *et coram non judice.*—*Sed non allocatur*; for it may be, that at the firſt court holden the Recorder was there, and at the ſecond court he was abſent, and the court is well held by the cuſtom there before the mayor and two aldermen.

THE SECOND ERROR aſſigned was, Becauſe the judgment then is in an action for words which the defendant ſpake of the plaintiff, *viz.* "He hath ſtolen a tree formerly cut down, which "is felony, and I will cauſe him to be indicted for felony." BABINGTON alledged, that the words were not actionable, becauſe he doth not ſhew when the tree was cut down, nor that there was ſome ſpace of time between the cutting and taking away; for if it was not taken away inſtantly after the cutting, it was not felony. —*Sed non allocatur*; for the words are clearly actionable: for when he ſaith, "that he ſtole a tree formerly cut down," it is intended to be a long diſtance of time; eſpecially when he adds, "and that "is felony, and I will indict him of felony;" for it ſhews, he conceived he had committed felony, which was a great ſlander. Wherefore the judgment was affirmed.

CASE 12.

Owen *againſt* Long and Others.

Michaelmas Term, 15. *Car.* 1. *Roll* 571.

Juſtification of a commitment by the court of requeſts in *London*.

TRESPASS of aſſault, battery, and impriſonment, in the pariſh of *Saint Nicholas* in *Boſing-ſtreet*, for two days. The defendant juſtifies by reaſon of ſpecial act of parliament for the relief of poor debtors, 3. *Jac.* 1. c. 15. ſ. 5. (*a*), whereby it was enacted, "That "every poor citizen and freeman inhabiting in *London*, being ſued "for debt under forty ſhillings, may exhibit his ſuit in the court "of *London* called there the Court of Requeſts in *London*, who "ſhall nominate commiſſioners (*b*) to the number of twelve, and "that any three of that commiſſion may ſend for any creditor who "is complained of in ſuing for ſuch debt under forty ſhillings, "and if he refuſe to come, or perform not their orders, they may "cauſe him to be arreſted by any ſerjeant of *London*, and commit "him to priſon, there to remain until he perform the ſaid order." And the defendant ſaith, that by reaſon of the command of ſuch commiſſioners, at ſuch a pariſh in *Wood-ſtreet*, becauſe he refuſed

(*a*) Explained and extended to inhabitants generally by 14. Geo. 2. c. 10.

(*b*) See 25. Geo. 3. c. 45. ſ. 7. as to the qualification of the commiſſioners.

to

to come before them, he was committed to the compter in *Wood-ſtreet*; *et hoc paratus eſt verificare*. Upon this the plaintiff demurred.

OWEN *againſt* LONG and OTHERS.

PHESANT, *for the plaintiff*, took divers exceptions to the plea:

FIRST, Becauſe he doth not ſhew, that the debtor who complained was poor, and a citizen and freeman inhabiting in *London*, otherwiſe the act doth not give them authority to meddle (*a*).

(*a*) *Sed vide* 14. *Geo.* 2. c. 10.

SECONDLY, Becauſe the battery and impriſonment is alledged in the pariſh of *Saint Nicholas*, and he juſtifies in another pariſh, and doth not traverſe the battery and impriſonment alledged in the declaration.

Ante, 228.

THIRDLY, The concluſion of the plea is not well, *et hoc paratus eſt verificare*, where there are two defendants, for it ought to have been *parati ſunt*, &c.

Poſt. 594. Cowp. 425.

Martyn *againſt* Nichols.

CASE 13.

ERROR of a judgment in an ejectment. The error aſſigned, Becauſe the declaration was of a meſſuage and forty acres of land, meadow and paſture, thereto appertaining, and it was not diſtinguiſhed how much there was in land, how much in meadow, and how much in paſture.—Therefore the judgment was reverſed.

Ejectment of ſo many acres of land, meadow and paſture, muſt deſcribe the ſeveral quantities of each. Ante, 179. 471.—2 Roll. Rep. 166. 189. 1. Salk. 254. 1. Show. 338. Carth. 204. 4. Mod. 97. Hard. 57. Palm. 100. 3. Bac. Ab. 169. 5. Com. Dig. 274. 5. Burr. 2672. Cowp. 347. Dougl. 466. 1. Term Rep. 11.

Canwey *againſt* Aldwyn.

CASE 14.

Michaelmas Term, 15. *Car.* 1. *Roll* 132.

ASSUMPSIT. Whereas the plaintiff, at the defendant's requeſt, amended ſuch A BOAT, *and divers other boats* of the defendant's; that the defendant promiſed to ſatisfy and pay him for his labour and charges about the amendment of the ſaid boats *tantum quantum meruit*: and alledges in fact, *quòd meruit* thirty pounds, and that he required the payment of the defendant, who had not paid him according to his promiſe.

In *aſſumpſit*, an allegation that the plaintiff, at the requeſt of the defendant, mended A BOAT, *and divers other boats*, is ſufficiently certain, with an averment *quòd meruit* ſuch a ſum. Ante, 77.

The defendant pleaded *non aſſumpſit*; which was found againſt him.

GRIMSTON now moved in arreſt of judgment, that the declaration was not good, becauſe he alledged, that he amended and repaired *divers* boats for the defendant, and ſhews not what; ſo by reaſon of that uncertainty the defendant cannot know how much he ſhould pay; and therefore compared it to *Playter's Caſe* (*b*), where treſpaſs was brought *quare piſces ſuos cepit*, and adjudged ill for the uncertainty.

Yelv. 111. Cro. Eliz. 276. 435. 1. Sid. 413. 2. Saund. 373. Raym. 8. 3. Bulſt. 31. 1. Roll. Rep. 173. Salk. 557. 1. Com. Dig. 153. Cowp. 682.

BERKLEY, at the firſt, was of that opinion; but upon better adviſement, and reading over the record, "that he mended ONE "*and divers others*," and upon a precedent cited by MYSELF, that an action had been maintained here by a taylor for making A GOWN *and divers other ſuits* of apparel at the defendant's requeſt, and that he promiſed to ſatisfy and pay *tantum quantum*, &c. and HODDESDEN affirming there were divers precedents in the court of this nature,

(*b*) 5. Co. 34.

JONES,

CANWEY *against* ALDWYN.

JONES, BERKLEY, and MYSELF, agreed, that the declaration was good, and there was not any such uncertainty but that the defendant (at whose request the said boats were amended) might take conusance what boats he desired to have repaired: and verdict finding *quòd assumpsit*, and assessing damages, judgment given for the plaintiff.

CASE 15. Anne Healings, WIDOW, *against* The Mayor, Commonalty, and Citizens of London.

Judgment against a corporation, omitting part of the corporate name, may be amended by the docket roll. Ante, 430. Post. 581. 594. Moor, 869. Cro. Jac. 628.

ERROR of a judgment in the common pleas in debt, brought by them upon an obligation of four hundred pounds. The error assigned was, Because the judgment is, that the mayor, commonalty, and citizens of *London*, should recover the debt and pounds for costs *eisdem majori et communitati* adjudged (omitting *civibus*), and so no such corporation:—which was held to be error. But afterwards, upon a motion in the common pleas, upon examination and perusal of the *dogget-roll* (*a*) (where it was well entered), it was awarded to be amended.

Hob. 127. Raym. 39. 1. Sid. 70. 3. Term Rep. 749.

(*a*) See 4. & 5. Will. & Mary, c. 2.

CASE 16. The King *against* Sir John Dryden, Gybbs, and Others.

In a writ of right of advowson against coparceners, or joint-tenants, if one of them die *pais darrein continuance*, the writ shall abate; but not in the case of *novel disseisin* or *mort d'ancestor*. *Vide* ante, 511. 426. 509. Post. 583. 585. 589. Jones, 452. Bro. Brief, 295. 400. Bendl. 74. Hard. 113. Show. 56. 3. Mod. 249. Cro. Jac. 19.

RIGHT OF ADVOWSON against them as coparceners. Upon a special verdict by the grand assise, it was shewn that the tenants were coparceners, and that *Margaret Gybbs*, one of the tenants, was dead *puis darraigne continuance* before this Term, which was pleaded in abatement of the writ. The king's attorney hereupon traverseth that they were parceners; and upon that it was demurred.

Being moved in court, it was adjudged, without argument, that the writ should abate, and it was appointed that judgment should be so entered; for ALL THE COURT agreed, although it were admitted they were not coparceners, but joint-tenants, yet the death of one of them shall abate the writ being in a real action. And it is not like to the case of an *assise of novel disseisin*, or of an *assise mortd'ancestor*, where death of one of the tenants shall not abate the writ as long as there is a tenant living; for it is here allowed that every of them is tenant of a freehold. And although the attorney general affirmed there were two expres Books in the point, yet upon view of the said Books (*b*) they conceived they do not extend to this case; for it was only in *a scire facias* upon a *petition droit*, which differs from this case. But it was afterward adjourned by Mr.. Attorney's importunity until *Easter Term*, pretending that he would then argue the case (*c*).

(*c*) It was moved again in *Easter Term*; and adjudged in the *Michaelmas Term* following, upon great argument, that the writ should abate. *Vide* post. 583. 589.

(*b*) The YEAR-BOOKS 13. Edw. 3. tit. "Breve," 260. and 27. Ed. 3. pl. 83. *Vide* 7. Hen. 4. pl. 33. Tempus Edw. 1. "Breve" 857, 858. 40. Assise, 25. 1 Assise, 12. 1. Edw. 3. pl. 12. 6. Edw. pl. 270. 7. Edw. 3. pl. 300. - 43. Edw. pl. 16. 12. Hen. 6. 2.

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Smith *againſt* James.

CASE 17.

ERROR of a judgment in the court of the palace of *Weſtminſter* by the principal and bail.

Bail cannot bring a writ of error on the principal judgment, Ante, 300. 402. 561. Cro. Jac. 384. 1. Roll. 792.

The error aſſigned was as well in the principal judgment as in the execution againſt the bail; and it was moved by GRIMSTON, that therefore the writ of error was not well brought.—And ALL THE COURT were of the ſame opinion; whereupon the writ of error was abated.

Cro. Eliz. 155. Hob. 72. 5. Com. Dig. 291.

A declaration that the defendant aſſumed the 23. *December*, when it appears that he aſſumed the 23. *December to pay* 23. *January*, is bad. Ante, 272. 282. 1. Roll. Ab. 792. Cro. Eliz. 325. Cro. Jac. 70. Hob. 199. 2. Lev. 197.

They then brought ſeveral writs of error *quæ coram vobis reſident*. And the error aſſigned by the principal was, That the declaration was ill; and upon reading the record, it appeared in his declaration, that upon 23. *December*, 13. *Car.* 1. in conſideration of ſuch a ſum of money, the defendant aſſumed and promiſed, that he, 23. *January*, 13. *Car.* 1. would pay ſuch a ſum of money to the plaintiff.—And becauſe it appears by his own ſhewing, that this action was brought before there was any cauſe of action, THE COURT held, that the declaration was ill, and the judgment (although it was after verdict for the plaintiff) was erroneous, and therefore reverſed.

The writ of error by the bail, therefore, is not examinable, but falls of itſelf.

Carth. 114. 1. Show. 147. 1. Leon. 186. Yelv. 70. Jones, 304. 1. Com. Dig. 105, 106.

Sands *againſt* Trefuſes.

CASE 18.

ACTION ON THE CASE, for ſtopping a water-courſe running to his mill; and declares, that he was ſeiſed in fee of a mill, and had a water-courſe running in the defendant's land to the ſaid mill, and that the defendant had ſtopped his water-courſe. The defendant pleads a vitious plea; whereupon the plaintiff demurred.

In an action for ſtopping a water-courſe to a mill, it is not neceſſary to ſhew the *que eſtate*, or that it was an ancient water or mill. Ante, 500. 1. Ven. 237. 239. 1. Show. 7. Cro. Jac. 43. 1. Leon. 247.

And now BEARE, *for the defendant*, moved in arreſt of judgment, that the declaration was ill, becauſe he doth not declare that his mill was an ancient mill, and that the water-courſe was an ancient water-courſe, nor doth he preſcribe to have a water-courſe in the defendant's land.

But ALL THE COURT held it to be well enough, and may well maintain his action upon the caſe, being lawfully in poſſeſſion, and the ſtopping of the water is tortious, and a damage to his mill; and although he doth not ſhew *que eſtate*, that is not material; and it hath been divers times ſo ruled, *viz.* 33. *Eliz.* in *Sly v. Mordant.* But becauſe this was moved the laſt day of the Term, day was further given until the next Term.

See Carth. 444. and the caſes there cited. 3. Term Rep. 767.

Earl of Oxford *againſt* Waterhouſe.

CASE 19.

ERROR. After a ſpecial verdict and argument at the bar, there was *a diſcontinuance* entered by the plaintiff, as it was agreed he might; and it was moved, that coſts might be aſſeſſed for the defendant.—But THE COURT doubted whether coſts might be aſſeſſed, becauſe there was no verdict given in the caſe.

The defendant ſhall have coſts, if the plaintiff enter diſcontinuance after ſpecial verdict.

Ante, 175.—2. Roll. 713. R. 689. Leon. 105. Hutt. 36. Hardres, 152. 1. Bac. Ab. 525. Carth. 87. 2. Com. Dig. 549.

The

Case 20. The Mayor and Commonalty of London *againſt* Alford.

Lands were deviſed to truſtees and their heirs, upon condition that they ſhould *pay* a certain ſum of money every year for the ſupport of a ſchoolmaſter, &c. and if they ſhould not pay ſuch ſum, then to *B.* and if he do not perform ſuch truſt, then to *C.*; this ſecond *limitation* to *C.* is void, it being a *poſſibility* after a *poſſibility*. Ante, 284.

Co. Lit. 234. 10. Co. 42. 3. Roll. Ab. 411. 3. Leon. 283. Owen, 8. 4. Atk. 259. 2. Vezey, 420. 3. Burr. 1416. See Mr. Fearne's Eſſay on Contingent Remainders, 4. edit. 378.

TRESPASS. Upon a ſpecial verdict, upon not guilty pleaded, and tried at the bar, the caſe was:

Sir George Monox, formerly mayor of *London*, being ſeiſed in fee of twenty meſſuages in *London*, holden in burgage, where the cuſtom is, that they are deviſable as well in *mortmain* as otherwiſe, erected an alms-houſe and a ſchool-houſe in *Walthamſtow*, in the county of *Eſſex*; and for the maintenance of the ſame alms-houſe, ſchool-houſe, and a chapel there, he deviſed by his will in writing, the 33. *Hen.* 8. thoſe tenements whereof one of them is now in queſtion, to *Giles Briggs*, *Roger Alford*, and four others, whom he made his executors, HABENDUM to them, their heirs, and aſſigns: RECITING, That whereas he had erected an alms-houſe in *Walthamſtow* for thirteen poor people, and a ſchool-houſe and chapel there, he deviſed thoſe tenements to the ſaid ſix perſons, and to their heirs and aſſigns, upon condition, and to the intent and effect, that his ſaid executors and feoffees, their heirs and aſſigns, ſhould pay, out of the iſſues and profits of the ſaid houſes, 42l. 7s. 4d. in manner and form following, *viz.* to an honeſt prieſt which ſhall be ſchoolmaſter and teach children, 6l. 13s. 4d. yearly, and alſo pay weekly to the poor alms-people there 7d. a piece, and 5s. yearly to be beſtowed upon an *obiit*; and to pay to an able clerk to help to teach the children there 26s. 8d. and other charitable uſes. And if any part of the ſaid purpoſes remain undone and unperformed, then they find, that he deviſed the ſame to *William Monox*, and to the heirs males of his body, upon condition and to the intent to perform all the ſaid truſts and purpoſes; and if he failed for two months, then he deviſed them to the mayor and commonalty of *London*, upon the ſame conditions, and to repair *London bridge*; and if they failed, that his heir ſhould enter and perform the ſame: and by a ſchedule annexed to his will he appoints and adds ſome other conditions to the ſaid eſtate; and appoints, that none of thoſe deviſees ſhould hold by ſurvivor, but that the heir of him who died ſhould have his part. It was further found, that in 35. *Hen.* 8. the ſaid *Sir George Monox* died ſeiſed in fee, and that the ſaid ſix deviſees entered and enjoyed the tenements, but that none of them paid the ſums appointed to the clerk who was to attend in the chapel, but had failed in that point. They further found, that the ſaid *Roger Alford* died in *Edw.* 6. and that *Edward Alford* was his heir, and entered into his part, but hath not performed the truſt in this point; that in 5. *Eliz.* the heir of *Sir George Monox* entered for breach of the condition, and that *Edward Alford* entered and *ouſted* him; and that afterwards the ſaid *Edward Alford* purchaſed the parts of the other deviſees by deeds indented and inrolled in the Huſtings, who in 11. *Eliz.* bargained and ſold all their eſtates and rights in the ſaid tenements to the ſaid *Alford* and his heirs, upon truſt that he ſhould perform the purpoſes and declarations in the will of the ſaid *Sir George Monox* appointed; and that the ſaid *Alford* was in poſſeſſion; and that afterward, *viz.* 35. *Eliz.* he being in poſſeſſion, A FINE *ſur releaſe with proclamation* was levied to him; and that he continued his poſſeſſion, and died ſeiſed, which land deſcended to the defendant his ſon. They find further, that the

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ſum of 26s. 8d. was never paid to the ſaid clerk to this day, and that neither the ſaid heir of *Sir George Monox*, nor the mayor of *London* and commonalty, had any notice of this will, nor of the conditions, nor of the non-payment, until within theſe four years laſt paſt; and that after notice the mayor and commonalty entered, and *Alford* re-entered, whereupon the action was brought. *Et ſi ſuper totam, &c.* judgment ſhall be given for the plaintiff? was the queſtion.

THE MAYOR, &c. of LONDON *againſt* ALFORD.

It was very well argued at the bar *for the plaintiff*, and by *Serjeant* FINCH *for the defendant.*

Upon the argument three main queſtions were made: FIRST, Whether this be a condition or limitation appointed by the will? and, admitting it be a limitation, and that it may, after the firſt limitation, be good to the heir of *Sir George Monox*, Whether ſuch limitation may be good to the mayor and commonalty, being but a poſſibility?

SECONDLY, Admitting that they be limitations and good limitations of the eſtate of the deviſees, this being broken in the firſt year, and ſo *de anno in annum*, Whether there be a good title of entry for the heir of *Sir George Monox*, and after to the mayor and commonalty, for not performing of the truſts? and, they not having entered, but ſuffering a fine with proclamations, and five years to paſs, Whether this be not a bar to their entry?

A fine bars a title of entry for a condition broken.

S. C. 1. Jones, 452. 1. Ch. Rep. 64. Cro. Jac. 592.

4. Co. 105. 2. Inſt. 518. 2. Vern. 190. note (2). Co. Lit. 240. Cruiſe, 146. 199.

THIRDLY, Admitting there hath not been performance of the will, but a breach of the truſts, Whether the want of notice ſhall aid them? becauſe the words of the will are, "If through obli- "vion or other cauſe the truſts be not performed, then they ſhall "re-enter."

4. Co. 82. b. R. 408. R. 654. 725. R. 729. Dyer, 33. a. Co. Lit. 18. a. Cro. Jac. 146.

THE COURT reſolved, that the fine with proclamations, and the five years paſſed, hath abſolutely barred the plaintiff's eſtate: and they conceived alſo, that it is a void limitation to the mayor and commonalty, being a poſſibility upon a poſſibility: *Vide* 1. *Coke, Rector de Cheddington's Caſe:* and that the finding they had not notice was not material, for there is not any appointed to give notice, and they at their peril ought to take notice of breach of the eſtate. But for theſe two laſt points, they were not ſo unanimouſly reſolved; but for the ſecond they all abſolutely held, that the fine with the proclamation, and the non-claim and five years paſſed, hath abſolutely barred them: whereupon judgment was given againſt the plaintiffs.

Eaſter

Eaſter Term,

16. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*
Sir William Jones, *Knt.*
Sir George Croke, *Knt.* } *Juſtices.*
Sir Robert Berkley, *Knt.*
Sir John Banks, *Knt. Attorney General.*
Sir Edward Herbert, *Knt. Solicitor General.*

Freeman's Caſe.

CASE 1.

A perſon committed by the Privy-council is entitled to be bailed if the warrant do not expreſs a ſufficient crime with convenient certainty. Poſt. 593. Ante, 133. 503. 551. 558. 1. Bl. Rep. 576. Ld. Raym. 1108. 1. Bac. Ab. 382. 2. Hawk. P. C. 169. 185, 186.

FREEMAN was brought to the bar by *habeas corpus* out of *the Fleet*; and the return was, that he was committed on the 14th *February* 1639 by the Lords of the Privy-council, "for "divers cauſes and miſdemeanours, until they gave order to the "contrary," as appeared by their warrant there produced. It was alſo returned, that he was to be detained by another warrant from the ſaid Lords, 26th *April* 1640, wherein is mentioned, that he, being warned by a meſſenger in *December* to appear before the ſaid Lords, refuſed to come before them, and in contempt made a *refcous*, and cauſed thereby a great tumult in the town; which being proved before the ſaid Lords, by the oath of two perſons therein named, they thereupon, the 14th *February* 1639, committed him: and now by this warrant appointed the Warden of the *Fleet* to retain him, until they gave further order, &c.

BAGSHAW, *for the priſoner*, hereupon moved, that he might be diſcharged, or at leaſt bailed.

As to the firſt return, THE COURT held, if there had not been a ſecond commitment returned, he ought to have been bailed; but for the ſecond, they gave time until *Saturday* for the king's counſel to maintain the return, and to ſhew cauſe why he ſhould not be bailed: and the king's counſel ſaid, they would proceed againſt him by indictment or information; and that there were divers precedents where ſuch informations have been brought in this court for miſdemeanours.

Anonymous.

CASE 2.

A perſon committed *in execution* by one court cannot be bailed by another. Ante, 133. 168. 507. 2. Inſt. 55. 1 Term Rep. 220.

ONE *J. S.* upon an *habeas corpus*, was brought to the bar, and returned, that he was committed by order of the exchequer, 9. *Car.* 1. for not paying of a fine of fifty pounds by the eccleſiaſtical commiſſioners impoſed upon him.—And although it were not ſhewn wherefore the ſaid fine was impoſed, yet becauſe that commitment was by a judicial court, this Court would neither bail nor diſcharge him.

Vaugh. 137. Palm. 558. 3. Com. Dig. 456. 2. Hawk. P. C. 170. 173. 2. Term Rep. 190. 4.

Norton *againſt* Acklane.

Hilary Term, 15. *Car.* 1. *Roll* 549.

CASE 3.

Covenant lies by a leſſor againſt *his* leſſee for a breach committed after an aſſignment of the term, and after acceptance of rent from the aſſignee. Ante, 188. S. P. 2. Roll. Ab. 522. 3. Co. 24. 1. Saund. 240. 3. Lev. 233. 1. Sid. 402. 2. Vent. 234. Cowp. 203. Dougl. 461.

COVENANT upon an indenture of demiſe by the plaintiff to the defendant of an houſe for years; wherein the leſſee covenants for him and his aſſigns to repair the houſe from time to time, and

NORTON *againſt* ACKLAND.

and to leave it at the end of the term ſufficiently repaired: and for not repairing aſſigns the breach.

The defendant pleaded, that he aſſigned (by indenture ſhewn in court) all his eſtate and intereſt in the term to *John St.* ſuch a day and year, who entered and paid his rent at ſuch a Feaſt after to the plaintiff the leſſor, who accepted thereof; and that there was not any default of reparations before the aſſignment. Upon this plea the plaintiff demurs.

BROOM, *for the plaintiff*, ſhewed, that the action well lies againſt the leſſee, notwithſtanding this acceptance of the aſſignee to be his tenant, or againſt the aſſignee at his election; and he ſaid, that it was adjudged ſo in this court in *Brett v. Cumberland* (*a*), the record whereof is entered in *Hilary Term*, 14. *Jac.* 1. *Roll* 1486.

(*a*) Cro. Jac. 321. See alſo S. P. Barnard *v.* Godfeal, Cro. Jac. 309. 2 Com. Dig. 563.

And BRAMPSTON and MYSELF were of the ſame opinion (JONES and BERKLEY *being then abſent*). And becauſe we conceived the caſe to be clear, and ſo adjudged in the caſe laſt cited, we gave rule, that judgment ſhould be given for the plaintiff, unleſs, &c. And JONES and BERKLEY, being informed thereof at *Serjeants-Inn*, agreed, that the action well lay.

CASE 4.

Anonymous.

Hilary Term, 15. *Car.* 1. *Roll* 1656.

Qu. What proceſs ſhall iſſue upon inquiſition returned to a *noctanter*. *Vide* ante, 280. 440. and the caſes there cited. 2. Com. Dig. 431.

A WRIT OF DISTRINGAS, "*villatas circumadjacentes villæ de Dorling, ad levandum ſepes et foſſatas, &c. proſtratas per diverſas perſonas ignotas, et ad adquirendum, &c.*; which inquiſition being returned, and the malefactors unknown, they found damages, by virtue of the ſtatute of *Weſtm.* 2. c. 46. And hereupon the king's attorney prayed a *diſtringas* againſt the inhabitants.—And whether he ſhould have it without a *ſcire facias* ſued to anſwer, and what proceſs he ſhould have, was much doubted: wherefore the Court would adviſe thereof.

CASE 5.

Reymond *againſt* Burbedg.

Trinity Term, 15. *Car.* 1. *Roll* 1656.

In debt againſt an attorney *by bill*, a judgment *quòd querens nil capiat* PER BREVE inſtead of *per billam*, ſhall be amended. Ante, 574. 1. Roll. Ab. 206. 416. Hob. 327. Hutton, 41. Cro. Jac. 633. 1. Vent. 132. Cowp. 407.

ERROR upon a judgment in the common pleas in debt upon an obligation, conditioned for performance of an award. Upon demurrer (becauſe it was conceived the arbitrament was void), judgment was given for the defendant, *quòd querens nihil capiat per breve.*

GODBOLD, *for the plaintiff*, now aſſigned, That it was error, for the action was there brought by an attorney by a bill of privilege, and not by original writ; ſo the judgment ought to have been *nihil capiat per billam*, and not *nihil capiat per breve.*

And IT WAS HELD a manifeſt error, unleſs it were the miſtake of the clerk and amendable; but THE COURT doubted thereof, becauſe it was in the judgment, which is by the Court, and is not to be accounted the entry of the clerk only. An error of a judgment in treſpaſs againſt a biſhop for omitting *ideo capiatur pro fine* was reſolved (*a*) to lie well enough without it, for a *capias* lieth not againſt him. But for this point the Court would adviſe.

(*a*) Dyer, 315.

John

John Bishop of Salisbury *against* Hunt and Others.

CASE 6.

Trinity Term, 15. *Car.* 1. *Roll* 543.

TRESPASS for carrying away two loads of wheat, being set out for tithe, severed from the nine parts at *Stapleham*, in the parish of *Damorham*. The defendant pleads, that queen *Elizabeth* was seised in fee of the rectory appropriate of *Damorham*, and being so seised by her patents, dated 20th *June* in the twenty-second year of her reign, granted and demised the tithe of corn and hay growing in *Damorham* and *Stapleham* to *Anthony Ashley* for his life, remainder to *Robert Ashley* for his life; that *Anthony Ashley* was seised for life and died, and afterwards *Robert Ashley* surviving was seised; and that the defendants, by his command and as his servants, took the said loads of wheat, &c. The plaintiff replies, That before the grant to *Anthony Ashley* and *Robert Ashley*, queen *Elizabeth*, in the fifteenth year of her reign, by her letters patents, granted the said tithes to *Thomas Stockman* for twenty-one years; and that in the seventeenth year of her reign, by her letters patents reciting the said lease, she granted the reversion of the said tithes to the bishop of *Salisbury* and his successors, and entitles himself as successor, and that the tithes were severed, &c. and the defendants had taken them, &c. Upon this replication the defendants demurred generally.

Trespass for carrying away tithes. *Plea*, a grant of them from the Crown. *Replication*, a PRIOR grant. The plaintiff need not confess and avoid, or traverse the subsequent patent for by possibility the queen might have a new title after the first and before the second grant. Ante, 324.

Yelv. 151. Cro. Jac. 299. 681. Dyer, 171. Cro. Eliz. 30. 650. 6. Co. 25. Hobart, 102.

MAYNARD, *for the defendants*, shewed the cause to be, For that the defendants entitle themselves by grant from queen *Elizabeth*, in the twenty-second year of her reign, and the plaintiff claiming by queen *Elizabeth* doth neither confess and avoid, nor traverse, &c. And being argued at the bar,

BERKLEY and MYSELF held, that the plaintiff needs not to confess and avoid, nor traverse, when he claims by a former grant from the said queen, VIZ. *anno* 17. *regni sui*, which precedes the title alledged by the defendants: and if it be not a good grant, the defendants, who claim by a latter grant, ought to have traversed the precedent grant to the plaintiff, which is presumed to be good until the contrary be shewn; and the plaintiff needs not to answer to a puisne grant, alledged to be after his grant: and cited the case 6. *Co.* 24. *Helier's Case*, and 2. *Edw.* 6. *Br.* "*Confess. et Avoid.*" 66. *Dyer*, 366. 10. *Edw.* 4. 6.

But BRAMPSTON and JONES doubted, Because the queen might peradventure have a later title and make a good grant.

This being argued in *Hilary Term*, was adjourned until this Term: and now BRAMPSTON said, that he had considered of the books cited, and agreed that the plaintiff claiming by a former grant needs not to make either a confession and avoidance, nor traverse. Whereupon rule was given (JONES *absente*), that judgment should be entered for the plaintiff, unless, &c.

Plowden *against* Oldford.

CASE 7.

Michaelmas Term, 15. *Car.* 1. *Roll* 86.

ERROR of a judgment in the common pleas. The case upon the record was, That parson, patron, and ordinary, before the 13. *Eliz.* c. 10. made a lease for ninety-nine years, there being a

If a patron make a *lease of the next avoidance*, and afterwards confirms a *lease made by the parson*, and, on the death of the incumbent, a grantee of the next avoidance enters, and avoids the lease by the parson, and dies. and presents a new incumbent, such presentee shall hold the benefice discharged of the lease although it were confirmed by the patron who presented him.

PLOWDEN *againſt* OLDFORD.

S.C. Jones, 454. 1. Roll. Ab 480. 7. Co. 8. 10. Co. 43. Hob. 7. 225. Co Lit. 45. a. Dyer, 72. Mod. 67. 481. 3. Bac. Ab. 387.

grant of the next avoidance before this leaſe. Afterwards the parſon who made this leaſe died. The grantee of the next avoidance preſents another, who, being admitted, inſtituted, and inducted, entered and avoided this leaſe during his time, and afterward died. The patron, who joined in this leaſe for years, preſents a new incumbent, who was admitted, inſtituted, and inducted.

The queſtion was, Whether he ſhall hold it diſcharged of this leaſe for years, as his predeceſſor did?

And ADJUDGED that he ſhould; for the leaſe is totally avoided by the entrance of the ſecond incumbent, and not for his time only. JONES and BERKLEY were of this opinion (for BRAMPSTON and MYSELF were in chancery); and their reaſon was, Becauſe the parſon hath the entire fee, as a parſon may have of a rectory preſentative: and when he is in, and hath evicted the leſſee, it is an abſolute eviction of the entire term, without expectation of reviver; and it is not only an eviction for himſelf, but for all his ſucceſſors. Wherefore they gave rule, that judgment ſhould be affirmed. And this being reported to BRAMPSTON, *Chief Juſtice* of this bench, to LITTLETON, *Chief Juſtice* of the common pleas, to DAMPORT, *Chief Baron*, and to MYSELF, we all agreed to that judgment.—And afterward the caſe being moved again by GODBOLD, *Serjeant*, to have day till next Term to ſpeak in arreſt of judgment, THE COURT would not give any further day; but the judgment was affirmed.

CASE 8.

Torle's Caſe.

Perſons committed by the high commiſſion court for diſobeying their orders bailed by the king's bench. Ante, 114. 220. 4. Inſt. 327, 8.

TORLE and four others of the pariſh of *St. Bartholomew* were brought to the bar by *habeas corpora:* and by the return it appeared, That they were committed to a meſſenger for contempt to the eccleſiaſtical commiſſioners (*a*) for not performing of their order, in paying the pariſh-clerk his wages, rated by their order at fourpence the quarter for every houſe in *Great St. Bartholomew's*, which they refuſed to pay but according to their cuſtom, as they were rated by their churchwardens and veſtry.

DR. MERRICK and DR. ECLESTON now moved, that they ſhould be remanded; for they ſaid, this order was grounded upon the king's letters patents, wherein it is provided, that the clerks ſhould gather and receive their wages as ſhould be ordered by the high commiſſioners, and pretended that for any contempt they might fine and impriſon.

But upon this return they were bailed until the firſt *Tueſday* next Term.

(*a*) See 1. Eliz. c. 1. and 5. vol. Hume's Hiſt. Eng. 266. to 379. for an account of the powers and authorities of the court of high commiſſion.

CASE 9.

John Parker's Caſe.

An *excommunicato capiendo* is void by 5. *Eliz.* c. 23. unleſs it be returned into the king's bench and delivered of record to the ſheriff.

Cro. Jac. 567. Strange, 1189. 2. Peere Will 53. 293. Tremain, 444.

JOHN PARKER was brought to the bar by *habeas corpus*; and the cauſe of his commitment appeared to be, by virtue of a writ *de excommunicato capiendo*, grounded upon the chancellor of *Norwich's* certificate into the chancery. It was pleaded, that this *excommunicato capiendo* was void, and that the party was not lawfully impriſoned, becauſe by the 5. *Eliz.* c. 23. the writ ought to have been brought into the king's bench, and to have been inrolled there, and delivered in convenient time to the ſheriff.—And ALL THE COURT reſolved, he was not duly impriſoned; and therefore he was diſcharged.

The

The King *againſt* Sir John Dryden and Others.

CASE 10.

Ante, Page 574.

In a writ of right of advowſon againſt coparceners or joint-tenants, the writ ſhall abate if one of them die *puis darrein continuance.*

THIS Caſe was now in the end of this Term moved again, that the writ of right of advowſon ſhould abate by the death of one of the tenants, although it be admitted that they were jointenants. —Now becauſe neither MASTER ATTORNEY or any other had argued for the king all this Term, ALL THE COURT retained their former opinion, that the writ ſhould abate, and that judgment ſhould be entered accordingly.

See ante, 574. Poſt. 585.

Thomas Benſted's Caſe.

CASE 11.

To attack a privy counſellor in a tumultuous and warlike manner with intent to change the meaſures of government is HIGH-TREASON.

THOMAS BENSTED, *die Jovis poſt clauſum Termini*, was indicted and arraigned before ſpecial commiſſioners of *oyer et terminer*, in *Southwark*, wherein ALL THE JUSTICES AND BARONS were in commiſſion and preſent; at which time, upon conference with all the Juſtices, it was reſolved,

FIRST, That going to *Lambeth-houſe* in warlike manner to ſurprize the archbiſhop, who was a privy-counſellor (it being with drums and a multitude, as the indictment was, to the number of three hundred perſons), was treaſon (*a*).

1. Hawk. ch. 17. f. 25. Foſter, 209. 211. 1. Hale, 141. Dougl. 210. } Rex v. Lord George Gordon, Dougl. 590.

A traitor may be indicted, arraigned, and tried under a ſpecial commiſſion of *oyer* and *terminer* on the ſame day.

SECONDLY, That the ſitting, and enquiry, and trial of the priſoners, all upon one day, by virtue of the commiſſion of *oyer and terminer*, without any commiſſion of gaol-delivery, was good enough, notwithſtanding THE YEAR-BOOK of 2. *Hen.* 8. *pl.* 159. which was held to be no law.

Ante, 448.—2. Inſt. 568. 590. Keilw. 159. Sum. 109. Kely. 77. Ld. Ray. 67.

Breaking priſon by which traitors eſcape, is high-treaſon.

THIRDLY, It was reſolved by ten of the ſaid Juſtices *ſeriatim*, that the breaking of a priſon wherein traitors are in durance, and cauſing them to eſcape, is treaſon, although the parties did not know that there were any traitors there, upon the caſe in THE YEAR-BOOK 1. *Hen.* 6. *pl.* 5. b.; and ſo to break a priſon whereby felons eſcape is felony, without knowing (*b*) them to be impriſoned for ſuch offence.

S.C. Jones, 455. 2. Inſt. 590. Stamf. P.C. 32. Foſter, 344. 1. Hale, 269. 2. Hawk. P. C. 210. 3. Peere Wms. 469, 470.

(*a*) This point is not mentioned in the report of the caſe by Sir William Jones, 455. The cauſe and circumſtances of this tumult are ſtated to have been, that on the 5th of May 1640 the king ſuddenly diſſolved the parliament, and ſuffered the convocation ſtill to ſit, to the general diſſatisfaction of the nation. The blame and odium of both theſe unpopular meaſures were laid upon *Laud*, the archbiſhop of Canterbury. On Saturday 9th May 1640 a paper was poſted up at the Exchange, exhorting the apprentices to riſe and ſack the archbiſhop's houſe on the Monday following; and accordingly on the night of that very day an attack was made upon archbiſhop Laud in his palace at Lambeth by above five hundred perſons, with open profeſſion and proteſtation that they would tear the archbiſhop to pieces. On the Thurſday following the ſpecial commiſſion was opened and proceeded on. *Benſted*, a ringleader in the tumult, was *convicted*, and within a very few days afterwards executed. Foſter, 211. 6. Hume, 290. 3. Ruſhw. p. 1167. Whitlock, p. 33. Dugdale, 62. And ſee Mr. Juſtice Foſter's Obſervations on this Caſe, 1. Diſc. p. 209. to 212. and 3. Diſc. 445.

(*b*) *Sed vide* 2. Hawk. P. C. ch. 18. f. 17.

Trinity Term,

16. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Solicitor General.

CASE 1.

Memorandum.

Twelve Serjeants called.

IN the Vacation betwixt *Eaſter* and *Trinity Terms*, by the nomination of SIR JOHN FINCH, *Knight*, Lord Keeper of the Great Seal, and SIR EDWARD LITTLETON, *Chief Juſtice* of the Common Pleas, theſe twelve were appointed to be Serjeants:

OF THE INNER TEMPLE,
John Stone,
John Whitwick,
Henry Rolls;

OF THE MIDDLE TEMPLE,
William Littleton (ſecond brother of the ſaid *Sir Edward Littleton*),
—— *Bryerwood*,
Robert Hide;

OF LINCOLN'S-INN,
Rich. Taylor,
Ed. Atkins, and
John Green;

OF GRAY'S-INN,
Peter Phe'ant,
Fran. Bacon, and
Sampſon Euers, (the King's Attorney in the marches of *Wales*, and now made one of the King's Serjeants);

all of them then benchers, and having been readers of their reſpective houſes, who had writs delivered them, bearing *teſte* 21ſt *May*, returnable in chancery *Octabis Trinitatis*, which was *die Lunæ*: and they appeared in chancery *die Jovis*, being the *quarto die poſt*, and were ſworn, and gave rings, &c.

CASE 2.

Leyton's Caſe.

An indictment for a *nuſance* to the highway is bad, if it omit the words *vi et armis*.

RICHARD LEYTON was indicted, For that he at *S.* in the county of *Middleſex*, had erected a barn upon parcel of the highway leading from ——, and concluding *ad grave et commune nocumentum omnium ligeorum ac ſubditorum domini regis per viam prædictam eantium tranſeuntium equitantium*, &c.

1. Vent. 108. 2. Lev. 221. Cro. Jac. 527. 6. Mod. 128. Yelv. 66. Stra. 834. Salk. 381.

And GRIMSTON moved (the words *contra pacem* being omitted), that the indictment might be quaſhed.

BERKLEY and MYSELF, being only in court, agreed, that for this cauſe the indictment was ill: and *I* held, that it ought by the law to be quaſhed.

2. Hawk. P. C. 345.

The Court will not quaſh a bad indictment for *a nuſance*, unleſs there be a certificate that the nuſance is removed.

But BERKLEY would not agree thereto, becauſe the uſual courſe is not to quaſh an indictment for nuſance in an highway without a certificate that the nuſance was removed and avoided: and although there were a certificate by many of the inhabitants within the ſaid vill and places adjoining, that the barn was not erected

1. Vent. 370. Salk. 372. 380. 460. Andrews, 220. 3. Com. Dig. 503. 2. Hawk. P. C. 367. Sayer, 158. 161. Stra. 602. Burr. 1127. 2116. 1. Wilſ. 325. 1. Ter. Rep. 316.

upon

upon the highway, nor the highway ſtraitened thereby, yet he would not aſſent to have the indictment quaſhed. But *I* conceived, becauſe the certificate was, that there never was any ſuch nuſance erected, and the indictment being agreed to be vicious, it ought to be quaſhed for the ſaid error, when it is apparent, &c.; for to traverſe and try it is a charge and to no purpoſe, becauſe the party in an action upon the caſe cannot recover his damages and coſts for falſely and maliciouſly indicting him, although he be acquitted; eſpecially here when the indictment is totally vicious. LEYTON'S CASE.

Abdy's Caſe. CASE 3.

JOHN ABDY, an alderman of *London*, having an houſe at ——, in the county of *Eſſex*, where it was pretended, that conſtables ſhould be elected out of the inhabitants in every houſe, by preſentment every year in the leet of *Sir William Hicks*, lord of the ſaid manor and leet; the ſaid *Alderman Abdy*, by the name of JOHN ABDY, *Eſquire*, was nominated in a leet holden ſuch a day to be conſtable there for the year following: and becauſe he refuſed, one *John Duke*, being ſteward there, impoſed a fine upon him, and denied him his privilege to be freed by reaſon of his being an alderman.

An *alderman* of LONDON cannot be elected into the office of *conſtable*. Ante, 389. S.C. Jones, 462. Moor, 845. 6. Mod. 282. 1. Bac. Ab. 441. 4. Bac. Ab. 218. 2. Bl. Rep. 1126. 1. Com. Dig. 450. Douglas, 538. 2. Hawk. 100. 1. Term Rep. 686. 2. Term Rep. B. R. 404.

This being ſuggeſted, it was moved to have a writ out of this court, directed to the lord of the ſaid manor or his ſteward, to diſcharge him, becauſe he being an alderman of *London*, ought to be there reſident the greateſt part of the year; and if abſent, is finable.

And ALL THE COURT held, that he ought to be diſcharged by his privilege; as attornies attending in courts are diſcharged of ſuch offices of conſtables and other offices in the pariſh. And although it was ſaid, he might execute it by deputy, and his perſonal attendance is not requiſite by the cuſtom of the ſaid manor; yet *non allocatur*. Whereupon it was awarded, that a writ ſhould be directed to the lord of the ſaid manor to diſcharge him.

Sir John Dryden, Margaret Gybbs, and Will. Kingſmill, Plaintiffs, *againſt* Thomas Yates and the Biſhop of Peterborough. CASE 4.

Michaelmas Term, 10. *Car.* 1. *Roll* 1433. *Ante, Page* 583.

QUARE IMPEDIT to preſent to the church of *Middleton-Cheney*: wherein the ſaid plaintiffs count, That *William Wilks* was ſeiſed in fee of the advowſon of the ſaid church as in groſs, and the church being void, preſented thereunto one *Edward Broome*, who was admitted and inſtituted in the time of queen *Elizabeth*, and being ſo ſeiſed died, which deſcended to *Robert Wilks* his ſon and heir; and he being ſo ſeiſed, died ſeiſed without iſſue, which deſcended to *Anne*, *Frances*, and *Margaret*, as to his ſiſters and coheirs, whereby they were ſeiſed in fee: that *Frances* took to huſband *Sir Eraſmus Dryden*, Baronet, who died ſeiſed of that part of the advowſon *pro indiviſo* with the other two ſiſters, which deſcended to *Sir John Dryden* their ſon (and ſo conveys the deſcents to the other ſiſters); and that by the death of the ſaid *Edward Broome*, the laſt incumbent, it belongs to them to preſent: and the defendants diſturbed them.

In *quare impedit*, if the defendant plead a ſeiſin in the crown, and that the king preſented *A.* and deduce title from the crown, a traverſe of the preſentation to *A.* without traverſing the prior ſeiſin in the crown, is good. 5. Com. Dig. 114.

The biſhop pleaded, that he claims nothing but as ordinary.

Sir John Dryden and Others *againſt* Yates and the Biſhop of Peterborough.

The defendant *Yates* pleaded, that he is parſon *imparſonée* of the preſentment of the king; and that before the ſaid *William Wiis* had any thing to do in the ſaid advowſon, queen *Elizabeth* was ſeiſed in fee of the ſaid advowſon *jure coronæ*, as of an advowſon in groſs; and after the death of the ſaid incumbent preſented *James Ellis*, who was admitted, inſtituted, and inducted: that afterwards queen *Elizabeth* died, and the ſaid advowſon deſcended to king *James*, and from him to the king which now is, who preſented the defendant.

The plaintiff replies, as in his declaration, that the church being void by the death of *Broome*, they preſented, &c.; and TRAVERSES, that *James Ellis* was admitted, inſtituted, and inducted upon the preſentation of queen *Elizabeth*; and ſo joined iſſue.

It was found by verdict at the common pleas, that the ſaid *James Ellis* was not admitted, inſtituted, and inducted upon the preſentation of queen *Elizabeth*, as the defendant hath alledged: and that the ſaid church, the laſt of *September* 1633, *vacavit per mortem* of *Will. IV*—, the laſt incumbent there, *et valet* 200*l. per annum ultra repriſas*; and that the ſaid church is full of *Thomas Yates ex præſentatione regis nunc: ideo conſideratum eſt quòd querentes recuperent præſentationem ſuam verſus defendentem*; *et habeant breve* to the biſhop of *Peterborough*, *quòd non obſtante reclamatione* of the ſaid *Thomas Yates*, *ac licèt* the ſaid *Thomas Yates* was admitted, inſtituted, and inducted into that church, that he ſhould amove the ſaid *Thomas Yates*, *et idoneam perſonam ad præſentationem* of the plaintiffs *admittat ſine dilatione: et conſideratum eſt*, that the plaintiffs *recuperent verſus* the ſaid *Thomas Yates damna ſua pro valore eccleſiæ pro dimidio anni ſecundum formam ſtatuti*, which amounted to 100*l. et prædictus Thom. Yates in miſericordiâ.*

Upon this judgment *Yates* brings a writ of error, and aſſigns for error,

FIRST, That the plaintiffs in their replication traverſe the admiſſion, inſtitution, and induction of *James Ellis* of the preſentation of queen *Elizabeth*; and hereupon iſſue joined and tried, where they ought to have traverſed the ſeiſin of queen *Elizabeth*, and not the admiſſion, &c.

THE SECOND ERROR, Becauſe judgment was given for the plaintiff, where it ought to have been for the defendant.

L. Raym. 237. The defendants pleaded, *in nullo eſt erratum.*

Ante, 105. a. 174. And after divers arguments at the bar it was adjudged, that the traverſe was good and well taken, and that the ſeiſin in the queen ought not to have been traverſed. Whereupon rule was given, that judgment ſhould be affirmed. *Vide poſtea*, 589.

Case 5.

Thorn *againſt* Shering.

Hilary Term, 15. *Car.* 1. *Roll* 588.

A traverſe upon a traverſe is bad pleading. Ante, 105. Yelv. 147. Cro. Eliz. 463. 6. Co. 24. a. 2. Lut. 1630. Carth. 166.

TRESPASS *de clauſo fracto*. The defendant juſtifies his entry by the command of *J. S.* The plaintiff replies, and ſhews, that *J. S.* was ſeiſed in fee and let to him at will, and traverſeth the command of *J. S.* The defendant maintains, that *J. S.* commanded him to enter, and that he entered by his command, and traverſeth the leaſe at will: and hereupon it being demurred,—IT WAS ADJUDGED for the plaintiff, that the command was traverſable; and that the defendant's rejoinder to make a traverſe upon a traverſe, as this caſe is, was not good. Wherefore judgment was given for the plaintiff.—In *Eaſter Term*, 38. *Eliz.* in *Parker's Caſe*, adjudged that the command is traverſable.

Michaelmas

Michaelmas Term,

16. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir William Jones, *Knt.*
Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Herbert, *Knt. Solicitor General.*

George Meade *againſt* Sir John Lenthall.

CASE 1.

An office to which a truſt is annexed, or which concerns the adminiſtration of juſtice, cannot be granted for years.

Jones, 463. 2. Bul. 58. 1. Roll. Ab. 847. 2. Roll. Ab. 189. 678. 9. Co. 97. 4. Com. Dig. 287. Hob. 153. 3. Mod. 145. 3. Bac. Ab. 302. Dougl. 398. 2. Term Rep. 81.

ACTION ON THE CASE for diſturbing him to execute the office of MARSHAL OF THE KING'S BENCH, granted to him by patent for years (*a*). Upon not guilty pleaded, and ſpecial verdict found, the ſole queſtion was, Whether a patent of this office granted for years (which was the plaintiff's title) be good or not?

It was argued by JENKINS and MAYNARD, *for the plaintiff*; and by HEATH and ROLLE, *for the defendant*. And after adviſement of the Court until this Term, it was agreed *nullo contradicente*, that judgment ſhould be given for the defendant.

BRAMPSTON, *Chief Juſtice*, delivered all their opinions to be ſo, principally for the reaſons given in the caſe of *Sir George Reignolds*, 9. *Co.* 97.: for this being an office of great truſt, and attendance continually in court, great inconveniences would enſue if ſuch offices might be granted *for years*, which thereby might come in ſuſpence upon probate of a will, until adminiſtration were committed thereof; and it might fall, or be given to perſons inſufficient, of whom the Court could not conveniently admit. And whereas it was objected, that it may be granted in fee or in tail, &c. and ſo deſcend to an infant, &c. and therefore for years; it was anſwered, that in ſuch caſe the Court hath uſed to put in another fit perſon for the time. And whereas it was objected, that offices of ſheriffs were granted for years, until reſtrained by a ſtatute of 14. *Edw.* 3.; it was anſwered, that thoſe grants were *de facto*; but it never was debated, what inconveniency might enſue by the granting of ſuch offices in that manner which concern the juſtice of the kingdom, and which require continual attendance.

(*a*) See 27. Geo. 2. c. 17.

Lodge *againſt* Hollowell.

CASE 2.

Trinity Term, 15. *Car.* 1.—*In the Crown Office.*

If a currier buy hides of leather, and curry and tan them, and ſell them unwrought into made wares, he incurs the penalties impoſed by 1. *Jac.* 1. c. 22.

INFORMATION for the king, the city of *London*, and the informer; For that the defendant, being a currier, bought two hides of tanned leather, each of them of the value of ſixteen ſhillings, of perſons unknown, and ſold them unwrought, and not converted into made wares, to one *James Mercer*, a ſhoemaker in *London*, *contra formam ſtatuti*; whereupon he demands the third part of the ſaid value for the king, the third part for the city of *London*, and the third part for himſelf.

LODGE *againſt* HOLLOWELL.

The defendant pleaded not guilty; and the jury find a ſpecial verdict, that the defendant being a citizen and inhabitant of *London*, bought the ſaid two hides of perſons unknown, and after curried them with oil and tallow and other things neceſſary, and after ſhaved and dyed them; and ſo being wrought, ſold them to the ſaid *James Mercer*, a ſhoemaker in *London*: and, Whether that be a buying and ſelling (not being otherwiſe, nor converted into made wares) againſt the form of the ſtatute? they prayed the diſcretion, &c.; and found them to be of the ſame value as in the information, &c.

It was argued at the bar by ROLLE, *Serjeant*, and MAYNARD, *for the plaintiff*; by MALLET, *Serjeant*, and HOLBORN, *for the defendant*; and this Term by ALL THE COURT *ſeriatim*, becauſe it concerned a multitude of curriers.

See 3 Burn's Juſtice, title "LEATHER."

And they all reſolved, that it was an offence againſt the ſtatute of 1. *Jac.* 1. c. 22. and the value forfeited by the ſtatute; for this ſelling by a currier, not being cut out and made into wares, is againſt the letter and meaning of the ſtatute of 5. & 6. *Edw.* 6. c. 15. 27. *Eliz.* c. 16. and 1. *Jac.* 1. c. 22. all which were well weighed and conſidered; and this information is grounded upon the ſtatute of 1. *Jac.* 1. c. 22. for it demands the third part, which none of the other ſtatutes gives. And the ſtatute of 5. *Edw.* 6. c. 15. is perpetual, which expreſsly forbids all perſons to regrate for the buying and ſelling by wholeſale, and all perſons who are not artificers, to convert leather into made wares: and this is a perpetual ſtatute, not repealed by any, unleſs by the 1. *Mary*, ſ. 2. which repeals 5. & 6. *Edw.* 6. c. 15. as made and procured by the ſhoemakers for their private gains: and the curriers were reſtrained by the ſaid ſtatute; and therefore the ſtatute of *Mary* repealed the ſtatute of *Edward* the ſixth, and allowed curriers to buy and ſell leather to artificers who work it into made wares. But this ſtatute of queen *Mary* was repealed by the ſtatute of 1. *Eliz.* c. 8. which repeals eight ſeveral ſtatutes there mentioned concerning leather, and expreſsly revives the ſtatute of 5. & 6. *Edw.* 6. c. 15. (becauſe by the repeal thereof leather was dearer, boots and ſhoes and other wares ſold at exceſſive prices, to the undoing of many) but only as to one clauſe therein, *viz.* that ſhoemakers may ſell boots and ſhoes and other wares at *Calais* (which then in the time of *Edward* the ſixth was *Engliſh*). But now becauſe that part of the ſaid ſtatute was repealed, it ſhews that all other parts of the ſaid ſtatute are continued, and eſpecially the ſtatute of 27. *Eliz.* c. 16. is expreſsly in the point, that curriers by name ſhall not buy and ſell tanned leather, unleſs it be wrought and cut out, and converted into made wares now uſed, or hereafter into made wares; which ſhew that currying only is not accounted a converting into made wares. And BERKLEY cited *Bracton*, who deſcribes wares to be made by cutting out and ſewing, and converting them into another ſpecies: and the ſtatute of 1. *Jac.* 1. c. 22. repeals the ſtatute of 1. *Eliz.* c. 8. (*a*); for it hath the ſame words, "no perſon or perſons, &c. tanned leather, "&c. they who convert it into made wares, &c." And although it was objected by HOLBORN, that this ſtatute was never *in ure* againſt curriers, but that currying and dreſſing hath been accounted made wares by their trades; it was anſwered, that thoſe ſtatutes being in force and not repealed, the currier was bound thereby and

(*a*) Repealed by 5. *Eliz.* c. 8. as well as by 1. *Jac.* 1. c. 22. But ſee the ſtatutes 9. *Ann*, c. 11. 1. *Will.* c. 23. ſ. 4. and 12. *Geo* 2. c. 25.

puniſhable,

punishable, as it is held in the like case 4. *Edw.* 4. *pl.* 1. and 11. *Hen.* 4. *pl.* 38. Wherefore they all held, that a currier may not sell nor buy by wholesale; but peradventure they may buy and sell in any other manner, not prohibited by any statute, as to coachmakers, joiners, and others, for the making of chairs and stools who used such leather: and great inconvenience would ensue if they should be permitted to buy and sell whole, not cut out, and made into some kind of wares. Wherefore it was adjudged for the plaintiff.

LODGE *against* HOLLOWELL.

Orme *against* Pemberton.

CASE 3.

On a *custom* for parishioners to chuse a parish-clerk, the king's bench will grant a *mandamus* to the archdeacon to swear him in. Ante, 552. Cro. Jac. 670. 1. Bl. Com. 395. Cowp. 370. 2. Term Rep. 177.

THE PLAINTIFF prayed to have a writ granted to revoke *Pemberton*'s election, who was chosen by the parson of *St. Catherine*, in *Coleman-street*, to be clerk of the said parish, whereas the parishioners at their vestry, according to the custom of the parish, had elected the said *Orme*; and that the Court would direct them to admit the said *Orme*.—And hereof THE COURT would advise, and appointed that precedents should be searched what hath been done in such cases. In *Trinity Term*, 21. *Jac.* 1. a prohibition was awarded against a parson and clerk who sued in the spiritual court to be admitted, as elected by the parson, and the other elected in the vestry.

Yates *against* Sir John Dryden and Others.

CASE 4.

Michaelmas Term, 10. *Car.* 1. *Roll* 1473.—*In the Common Pleas.*

Ante, Page 585.

If the king brings a writ of right pending error in *quare impedit*, the proceedings shall stay till trial had.

ERROR of a judgment in the common pleas in a *quare impedit*; where the judgment being upon verdict, *Yates* brings a writ of error, and hanging the writ of error the king brings a writ of right of advowson; and by motion to the Court, the proceedings in the writ of error were stayed until the trial in the writ of right; and when *the mise* was joined upon the right, who had best right: and thereupon special verdict given.

In writ of right the suit abates by death of tenant after verdict. Ante, 574.

After verdict one of the tenants died. The question was, Whether thereby the writ should abate?—And after long debating, it was resolved and adjudged, that the writ should abate in all.

Injunction to stay proceedings after judgment affirmed, *nisi*, &c. on a writ of error.

The Court afterwards proceeded to the examination of the errors; and upon debate adjudged, that it was not erroneous, and gave rule that judgment should be affirmed, unless cause were shewn the first *Monday* of this Term: and no cause being then shewn, rule was absolutely given, that judgment should be affirmed.

3. Kely. 17. Chan. Cas. 448. Gilb. Chan. 194. 2. Harrison's Chan. 223.

In the interim, *Yates* exhibited a bill in the exchequer chamber against the defendants in the writ of error, and served them; and, upon their answer, obtained an order to stay that suit, that they should not draw up the said judgment, and served all the parties and their counsel therewith; and afterward served the prothonotaries of this court with this injunction, that they should not enter up the judgment which the Court had commanded to be entered up.

The

YATES *againſt* SIR JOHN DRYDEN and OTHERS.

The Attorney General hereupon exhibited a plea, which was, that *Margaret Gybbs* held that advowſon in coparcenary with the other two plaintiffs by knight's ſervice *in capite*, and died ſeiſed, which deſcended to *William Gybbs* her ſon and heir, of full age, *viz.* of twenty-ſeven years; and for want of his ſuing out livery, it belonged to the king to preſent; and demanded judgment *ſi executio.*

THE COURT all held it to be no plea, eſpecially there being no office produced finding the ſame.

Whenever a clear title appears upon record for the king, the Court ſhall, *ex officio*, give judgment in his favour.

The Attorney and Solicitor General much inſiſted, that a title appearing for the king, the Court *ex officio* ought to award for the king; and relied upon 21. *Edw.* 3. *pl.* 30. 12. *Hen.* 7. *pl.* 12. that the king ſhould have the right of any coparcener, and *N. B.* 38. *E.* that where title appears for the king (*a*), the Court ſhall award a writ to the biſhop for the king.

Hob. 127. Moor, 872. 1. Mod. 27. b. Vaugh. 64. Hard. 170.

Yet ALL THE COURT held, that here, as it is alledged, there is not any colour of plea, but it ought to be rejected; for it is but matter in fact, eſpecially in this writ of error, the judgment being given in the common pleas, and execution for damages given in the caſe, and increaſed here by the ſtatute of 3. *Hen.* 7. c. 10. which is not to be eſtopped, or the parties to be delayed by ſuch bare ſurmiſes, not being grounded upon any matter of record.

The caſe was afterwards argued at the bar by HOLBORN, *for the defendants* in the writ of error, and prayed that judgment might be affirmed; for there is no colour for this plea, nor any matter confeſſed of record by pleading betwixt the parties, that the king hath title to preſent; for then, true it is, the Court ought to direct a writ to the biſhop for the king *ex officio*, as it is in 11. *Hen.* 4. *by Fitzh.* 38. 12. *Hen.* 12. *pl.* . 9. *Hen.* 7. *pl.* 9. 19. *Hen.* 7. *pl.* 12. *per Fineux:* but when it doth not appear upon the ſame record, there is not in ſuch caſe any book which maintains that a writ ſhould be ſent to the biſhop for the king.

In *quare impedit*, if a ſpecial verdict find that *A.* was not admitted upon the king's preſentation, a contrary verdict found in a writ of right for the ſame church, but not between the ſame parties, ſhall not avoid the verdict in *quare impedit.*

Cro. Jac. 134. 627. Hob 54. 4. Mod. 379.

And whereas it was here objected, that the verdict in the writ of right of advowſon (being a writ of the higheſt nature) ſhould control the verdict in the *quare impedit*; for there the verdict is, that the ſaid *James Ellis* was not admitted, inſtituted, and inducted *ad eccleſiam prædictam ad præſentationem dictæ nuper reginæ Elizabethæ modo et formâ prout* the defendant hath alledged; and the ſpecial verdict in the writ of right finds, that the ſaid *James Ellis* was admitted, inſtituted, and inducted *ad eccleſiam prædictam ex præſentatione dictæ nuper Elizabethæ reginæ*, which being a more high action deſtroys the former verdict in the *quare impedit*; and therefore the judgment and execution is thereby to be avoided, as BANKS, *Attorney General*, and HERBERT, *Solicitor General*, affirmed; HOLBORN anſwered thereto, Admitting there had been two contrary verdicts, yet the firſt verdict in the *quare impedit*, and judgment thereupon, ought not to be avoided unleſs by error or attaint. And whereas it was alledged, that where the ſaid verdict in the writ of right of advowſon found good title for the king, therefore the Court *ex officio* ought to ſtay the awarding of entering judgment upon the *quare impedit*, and ought to award a writ to the biſhop for the king; he

(*a*) See 9. Geo. 3. c. 16.

anſwered,

anſwered, Admitting there had been a good and abſolute title found therein for the king, yet being a collateral record, the Court ſhould have no regard thereto, but ought to proceed in the judgment to the reverſal or affirmance thereof in the common pleas, that being their commiſſion, and no other. And he ſaid, as this caſe now is, there being no general but a ſpecial verdict found, ſo as *non conſtat* what it is until judgment ſhall be given in the writ of error, that the ſaid judgment cannot now be given, and therefore it cannot avoid the firſt judgment in the *quare impedit*, becauſe the writ is abated by the death of one of the parties.

YATES *againſt* SIR JOHN DRYDEN and OTHERS.

Ante, 518.

5. Com. Dig. 176.

BERKLEY and MYSELF were of this opinion, for we have nothing to do but to reverſe or affirm the judgment, eſpecially as this caſe is, where judgment is given, and damages and coſts in the *quare impedit* againſt the defendants there, and no colour to ſtay execution thereof, and where damages are increaſed by this Court, the ſaid judgment being affirmed by the ſtatute of 3. *Hen.* 7. c. 10. becauſe the writ of error was in delay of execution; and this plea being matter of fact only, and demanding whether there ought to be execution, there being no apparent error aſſigned to reverſe the judgment, it cannot be good. *I* inſiſted upon *Holland's Caſe* (*a*), where it was agreed, that a writ of error is but a commiſſion to examine errors, and there much doubted what things might be aſſigned for error; and therefore was of opinion, that judgment being entered, and damages and coſts ſigned, it ought to be affirmed.

But becauſe the Attorney and Solicitor General were earneſt to argue for the king, THE COURT gave them liberty to argue if they would, the Solicitor upon *Monday* 16. *November*, and the Attorney upon the *Monday* following. The Attorney ſaid, that he for the king was to argue laſt, and that none ſhould argue after him; but I doubted thereof.

Qu. If counſel may *reply* on the Attorney General for the king.

At the day appointed the Attorney General argued very confidently, that no writ ought to be awarded for the plaintiffs to the biſhop in the writ of *quare impedit*; but that the Court *ex officio* ought to award a writ to the biſhop for the king: FIRST, Becauſe the verdict in the right of advowſon (although it be a ſpecial verdict) finds expreſsly contrary to the verdict in the *quare impedit*; and this being an action of an higher nature ought to be believed; for the verdict in the *quare impedit* finds, that *J. Ellis* was not admitted and inſtituted upon the preſentation of *Queen Elizabeth*; and the verdict in the right of advowſon finds, that *Queen Elizabeth*, *anno .....*, *non habens jus præſentandi*, preſented the ſaid *J. Ellis*, who was admitted and inſtituted to the ſaid preſentment of the queen, which is expreſsly contrary to the verdict in the *quare impedit*, and deſtroys the plaintiff's title, for the queen had gained right againſt all but him who had the true and very right; and the verdict *quòd ad manus noſtras*, *&c.* is better than the other who hath no right. And the caſes in 11. *Hen.* 4. *pl.* 71. and other Books before cited, were vouched again, that where title appears for the king, the record being in this court, although the writ is abated by death, yet there is a ſufficient record to entitle the king, whereof the Court ought to take notice: and he put many caſes, where, by

4. Com. Dig. 463.

3. Com. Dig. 199.

(*a*) Michaelmas Term, 40. & 41. Eliz.

reaſon

YATES *against* SIR JOHN DRYDEN and OTHERS.

reaſon of outlawry or felony, the Court ſhall award the parties to be in execution. SECONDLY, he ſaid, Although the grand jury found that the queen had *minus jus habendi præſentationem*, yet forasmuch as the queen preſented, ſhe hath gained the poſſeſſion, the admiſſion, and inſtitution of her clerk, and hath *majus jus* than he who hath not any title; and it appears not that the plaintiffs have any title: wherefore he prayed, that a writ might be awarded for the king.

But afterwards ALL THE COURT, *ſeriatim*, delivered their opinions, That the plea pleaded is merely void, being upon a ſurmiſe, and without any record ſhewn, as 4. *Hen.* 7. *pl.* 5. SECONDLY, That the verdict in the writ of right being but a ſpecial verdict, it doth not appear (if the writ had not abated by death), whether judgment ſhould have been for the king or for the defendants.

I conceived clearly, judgment ought to have been given for the defendants; for the verdict being, that *Queen Elizabeth non habens jus præſentandi*, yet preſented to the advowſon as *in ſuo pleno jure*, as the preſentation mentions, it is a void preſentment; for the queen was deceived in her preſentment, which made it merely void as to the queen, who can do no wrong; and the uſurpation is only in the incumbent, who procured himſelf to be inſtituted, and he is the wrong-doer, and againſt him only the *quare impedit* is always brought; and no poſſeſſion, or rather no right, is gained unto the queen by ſuch preſentments by uſurpation. But the other Juſtices doubted of this point.

Ante, 99, 100. 6. Co. 29. b.

But they all reſolved, that there ought to be a clear title and right appear for the king, and confeſſed by the parties in pleading, or otherwiſe fully apparent; for if not, the Court ought not to award a writ *ex officio* for the king: and as this caſe is, there is not any clear title appears, for by death the writ of the right of advowſon abated, and the verdict of no force; and that there is no ſuch contrariety appears by the verdict; for the ſecond verdict, if it had been in force, is no concluding record, but only an evidence, which may well be contradicted.

Hob. 127. Cro. Jac. 216.

But it was reſolved by them all, although the verdict had been in force, and had been to the contrary, yet being here by writ of error, which is only to affirm or reverſe the judgment given in the common pleas, they all agreed to affirm the judgment, and that there was not any error therein.

In the judgment of the common pleas, there being a writ awarded to the biſhop to remove the ſaid *Yates*, that writ ought to be awarded; and neither *Yates* nor any other, who hath pretence of title after the judgment, or pendent the ſame, can hinder but that the judgment and execution ought to paſs.

And for the damages which were given in the common pleas, and for the increaſe given in this court for the delay of execution (where 700l. damages and coſts are given for delay of execution, by the ſtatute 3. *Hen.* 7. c. 10.), they were well given, and due to the plaintiffs who ſurvived, and the death of one of the plaintiffs doth not alter the caſe.

7. Co. 26. b.

Whereupon judgment was affirmed, and writ awarded to the biſhop.

Lee's

Lee's Caſe.

CASE 5.

Perſons committed for abſenting themſelves from church admitted to bail after the indictment found. See the Toleration Act, 1. *Will. & Mary*, c. 18.

THE ſame day, being Saturday, RICHARD LEE and ſeven others were brought up on a *habeas corpus* from *Colcheſter*. It was returned, that they were committed there to gaol, being anabaptiſts, uſing conventicles, and abſenting themſelves from all parochial churches, and baptiſing and preaching, being all mechanical perſons, *viz.* taylors, weavers, and ſuch like. And it being proved by their own confeſſions, that one of their company, of the age of ſixty years, utterly diſallowed of the adminiſtration of the ſacraments by the miniſters of our church, an indictment thereupon being found at the ſeſſions of the peace holden at *Chelmſford* for the county of *Eſſex*, for their abſence from church for a month, and reſorting to conventicles, againſt the 35. *Eliz.* c. 1. they, being ſeverally arraigned, pleaded NOT GUILTY *modo et formâ*; which being returned, a trial was appointed to be at the bar upon *Tueſday* the twenty-fourth of *November* following. The ſtatute was read to them, becauſe they pretended there was not any ſuch ſtatute made againſt them, or that they knew of any ſuch ſtatute, but only againſt recuſants; and THE COURT adviſed them to conſider thereof, and timely to prevent the penalty which would enſue upon conviction. In the mean time they were appointed to be bailed, and to appear at the ſaid day of trial, and in the interim to be of good behaviour.

Brice's Caſe.

CASE 6.

A general warrant, in which no ſpecial cauſe of commitment is ſhewn, is void. Ante, 133. 507. 579. See alſo 16. *Car.* 1. c. 10. ſ. 8. and *Lord* ch. 15. ſ. 71.

BRICE, being committed by *the Earl of Denbigh*, brought his *habeas corpus*: and it being returned, that he was committed to the gaol of *Oxon* by the ſaid earl, "to remain there without bail or "mainpriſe until he were delivered by the Juſtices in eyre," it was ordered that he ſhould be bailed for twelve days, and that in the interim they ſhould amend the return; for the return being general, and no ſpecial cauſe ſhewn, it was held to be abſolutely void; and if the return were not amended, and good cauſe ſhewn at the day, it was ordered that he ſhould be abſolutely diſmiſſed.

Camden's opinion on it, 11. St. Tr. 319. and 2. Hawk. ch. 16. ſ. 4. and

Derby *againſt* Hemming.

CASE 7.

Hilary Term, 15. *Car.* 1. *Roll* .

A verdict on an iſſue miſjoined in the very point to be tried, is not aided by the ſtatute of *Jeofails*. 1. Roll. Ab. 200. 2. Roll. Rep. 135. Hobart, 113. Cro. Jac. 14. 550. 586. 2. Lev. 194. Stra. 641. 1. Com. Dig. 332. 5 Com. Dig. 145. 1. Bac. Ab. 104. 3. Bac. Ab. 717. Cowp. 826, Rep. 758.

ERROR of a judgment in the common pleas, in debt upon an obligation of one hundred pounds, conditioned for the payment of 51l. 6s. 8d.

The defendant pleaded, that he paid the foreſaid 21l. 6s. 8d. at the day; and ſo miſtook twenty-one pounds for fifty-one pounds.

The plaintiff replies, that he did not pay the ſaid 51l. 6s. 8d. at the day in the condition, *prout* the defendant hath pleaded; *et hoc petit quòd, &c. Et defendens ſimiliter.* And upon this verdict judgment was given for the plaintiff.

It was now aſſigned for error, For that the defendant pleads payment of 21l. 6s. 8d. and the plaintiff ſaith, *non ſolvit* the ſaid 51l. 6s. 8d. *et hoc, &c.* ſo there is not any iſſue.

THE COURT doubted herein, Whether there might be *a repleader* awarded? But becauſe it was adjudged in the common pleas, no iſſue being joined, and damages and coſts given, it was held there might not be *a repleader*. And it was reverſed.

Dougl. 683. 1. Term Rep. 141. 2 Term

Pelham

Case 8.

Pelham *againſt* Hemming.

Hilary Term, 15. *Car.* 1. *Roll* 999.

If the name of a party be right in the *record*, but wrong in the *judgment*, the judgment may be amended by the record. Ante, 574-580.

Cro. Jac. 633. 1. Roll. Ab. 201. 1. Vent. 217. 4. Mod. 371. 12. Mod. 384. 2. Stra. 1132. 1156. 1182. Cowp. 407. 841.

ERROR of a judgment in the common pleas, in debt upon an obligation of one hundred pounds, conditioned, that if *Henry Hemming*, or *Robert Hemming* the defendant, paid 51l. 6s. 8d. to *Sir Robert Napper* ſuch a day, then it ſhould be void.

The defendant pleads, *ſolvit ad diem*; and it was found againſt him, and judgment given for the plaintiff, *quòd recuperet debitum et damna*, &c. againſt the ſaid *Robert*, *et prædictus* HENRICUS *in miſericordiâ*, where it ſhould have been *Robertus*, for *Henry* was no party to the record.

MAYNARD, *for the plaintiff*, aſſigned this *ore tenus* for error.

And ALL THE COURT held, that this entry is but miſpriſion of the clerk; wherefore it was ruled, that it ſhould be amended, and the judgment affirmed.

Dougl. 114. 1. Term Rep. 782.

See 16. & 17. Car. 2. c. 8. and 4. & 5. Ann. c. 16.

Case 9.

Watkinſon and Joan his Wife *againſt* Turnor.

In battery againſt huſband and wife, where *he* pleads *not guilty*, and *ſhe* juſtifies, they ought both to join in the averment. Ante, 417-573.

Cro. Jac. 239. Cro. Eliz. 883. Hob. 126. 1. Brownl. 6. Palm. 68. 5. Com. Dig. 195. 3. Term Rep. 627.

ERROR of a judgment in the common pleas, in battery againſt the huſband and wife, where the defendant *Watkinſon* pleaded generally not guilty, and the huſband and wife *quoad* the wounding pleaded *non culp.* and *quoad* the battery the wife pleaded juſtification; and concludes with an averment, "*et hoc parata eſt veri-*"*ficare*," where it ought to have been, "*parati ſunt verificare.*"—And this being aſſigned for error, *ore tenus*, THE COURT much doubted whether it were good, for the huſband ought to have joined with the wife: wherefore they all would adviſe, and ſee the precedents in the common pleas in this point.

Case 10.

Tregoſe *againſt* Wennel.

Michaelmas Term, 15. *Car.* 1. *Roll* 226.

Upon *a writ* of replevin, if the ſheriff do not take pledges, the judgment will be *erroneous*; but on a replevin by *plaint* pledges are not neceſſary. Ante, 446.

8. C. Jones, 439. Cro. Jac. 414. 2. Inſt. 340. 3. Mod. 57. Manl. 46.

ERROR of a judgment in the common pleas, in *replevin*, brought in the hundred court by *pleint*, and removed into the common pleas by *recordare facias loquelam*.

The error was aſſigned, Becauſe it doth not appear that pledges were returned upon the *pleint*; and it was much inſiſted upon at the bar, that this was error, and relied upon *Huſſey's Caſe* (*a*).

And ALL THE COURT agreed, according to the ſaid caſe, that if upon the original writ pledges be not returned (becauſe the writ commands, that if pledges be found, that then, &c. and it is to the king's diſadvantage if pledges be not found, as the loſs of his fine), it was error; but whether it be ſo in this caſe was much doubted, becauſe the ſheriff may make *replevin* without pledges finding: and here the error is of the judgment in the common pleas, and it is no error in them; and peradventure pledges were found and not returned; and it is at the ſheriff's peril if he do not take pledges, according to the ſtatute of *Weſtminſter* 2. cap. 2.

(*a*) 9. Co. 71.

Memorandum.

Memorandum.

CASE 11.

UPON the ſixth of *November* this Term, The Lord Keeper of the Great Seal, The Lord Treaſurer, The Lord Privy Seal, The Earl of *Arundel* Earl Marſhal, The Earl of *Pembroke* Lord Chamberlain, The Lord *Cottington* Chancellor of the Exchequer, and all the Juſtices of both Benches and Barons of the Exchequer, were aſſembled in the exchequer-chamber to nominate three perſons, of every county throughout *England*, to be preſented to the king, that he might prick one of them to be ſheriff of every county, which is uſually done according to the ſtatutes 9. *Edw.* 2. ſ. 2. 14. *Edw.* 3. c. 7. 23. *Hen.* 6. c. 8. 21. *Hen.* 8. c. 20. upon the third of *November*, being *Craſtino Animarum* (*a*). But becauſe it was the firſt day of the parliament, and the lords were to attend upon the king, it was reſolved, by the advice and reſolution of the major part of the Juſtices, with whom conference was had in this cauſe, that it might be well put off to another day; and The Lord Keeper, notwithſtanding the ſtatutes, deferred it until this day.

The day for *billing* of ſheriffs adjourned on account of the meeting of parliament. Ante, 13. Impey's Off. Sh. 9, 10. 2. Com. Dig. 581. 4 Bac. Ab. 432, 433.

(*a*) Altered to the morrow of *St. Martin* by 24. Geo. 2. c. 48. ſ. 12.—See ante, 13.

Sloper *againſt* Child.

CASE 12.

Michaelmas Term, 15. *Car.* 1. *Roll* 651.

ERROR. The error aſſigned was, That in the writ of *venire facias* awarded to the ſheriff of *Somerſetſhire* the word *vicecomiti* was omitted; yet the ſheriff of *Somerſetſhire* returned the panel, and his name was indorſed; and after *habeas corpora juratorum*, the jury appearing, the verdict and judgment was for the plaintiff. —And this error being aſſigned, it was held a clear error: but becauſe upon the roll the writ was awarded "*vicecom. Somerſ.*" and the omittance of the ſheriff is the fault of the clerk, therefore ALL THE JUSTICES agreed, that it ought to be amended, and that the judgment ſhould be affirmed, unleſs, &c.

A *venire facias* leaving out "*vicecomiti*" may be amended after verdict by 8. *Hen.* 6. c. 15. Ante, 9. 1. Roll. Ab. 205. Hob. 68. Yelv. 64. 3. Bac. Ab. 274.

Sir Henry Williams's Caſe.

CASE 13.

SIR HENRY WILLIAMS prayed a prohibition to the council of the marches of *Wales*, becauſe he was ſued there for a legacy above the value of fifty pounds, *viz.* ſixty pounds: and it was anſwered at the bar, that their inſtructions were to hold plea of legacies of any ſum.—But THE COURT doubted thereof, whether ſuch inſtructions ſhould be good to warrant their proceedings, becauſe cauſes teſtamentary and legacies are ſuable in the ſpiritual court, and not elſewhere, notwithſtanding their inſtructions; for they cannot warrant that which is not according to law, and the ſtatute of 34. *Hen.* 8. c. 26. warrants that court.

Qu. If a legacy above 50l. can be ſued for in the marches of *Wales*? Ante, 531. 558. R. 528.

Calmady's Caſe.

CASE 14.

CALMADY prayed a prohibition to the court of requeſts, For that in an action of *trover* for divers goods, after verdict and judgment in this court, and affirmed in a writ of error, the defendant

Prohibition granted to the court of requeſts.

CALMADY'S CASE.

3. Inſt. 123. Cro. Jac. 335.

fendant furniſed matter of equity, and that he was ſurpriſed in the trial, and had not his witneſſes there, having had two verdicts before againſt this trial, the queſtion being upon ſale by the commiſſioners upon the ſtatute of bankrupts. Whereupon a prohibition was granted; and THE COURT RESOLVED, that ſo they would always do, whenever any exhibited bills were after verdict and judgment. In the Caſe of *Stepney v. Lloyd* (*a*), in the common pleas, where dureſs was pleaded to a bond, and afterwards an attachment iſſued out of the court of requeſts againſt the defendant, it was held to be a good plea, and there reſolved, that the court of requeſts cannot grant an attachment of contempt; and in 37. *Eliz.* it was agreed *per totam Curiam* to be againſt law, that the court of requeſts ſhould commit any; and in 40. *Eliz.* in this court, *Auſten v. Breerton* (*b*), in an action and judgment for the plaintiff, the defendant ſued in the court of requeſts to be relieved, this Court, upon examination, did bail the party, and SIR THOMAS GAWDY was convented before the queen for it; yet, notwithſtanding, it was held good enough, and *Breerton* was inforced to ſatisfy the ſaid judgment.

(*a*) Cro. Eliz. 647. (*b*) 3. Leon. 229.

CASE 15.

Anonymous.

Qu. If a ſequeſtrator of a rectory in *London* is within 37. *Hen.* 8. c. 12.?

Co. Eq. 192, 193. 2. Inſt. 660. Cro. Eliz. 276. Moor, 912. Noy, 130. Hob. 11. Lit. Rep. 102. Hard. 102. 116. 190. Bunb. 26. 238. 3. Com. Dig. 208.

PROHIBITION was prayed, For that one *J. S.* (who was a curate and ſequeſtrator of the rectory of *D.* in *London*, by reaſon that *Mr. Walker*, for contumacy and other cauſes, was ſuſpended from exerciſing his function there) ſued four of the pariſhioners in the ſpiritual court for tithes of their houſes, and not before the mayor, according to *the decree* and the ſtatute of 37. *Hen.* 8. c. 12. ſ. 2. 11. for they ought clearly to ſue before the mayor of *London*, and not in the eccleſiaſtical court, and therefore divers prohibitions have been granted. But whether in this caſe it was grantable, the ſaid *J. S.* being neither parſon nor vicar, was the doubt. And it was moved at the bar, that for houſes tithes ought not to be paid, unleſs there be a ſpecial cuſtom, as in *Dr. Grant's Caſe* (*a*) is clearly reſolved; and the ſtatute is introductive of a new law, and thereby is appointed how it ſhall be ruled, and before what Judges, and what remedy ſhall be for the party grieved, unleſs their order be obeyed; and then he may not ſue in another place, nor before other Judges than the ſaid ſtatute appoints; and if prohibition ſhould not be admitted for ſuing, it ſhould be a defrauding of the ſtatute, and would make it of none effect.—Wherefore THE COURT doubted, and would further adviſe, and gave day to hear counſel on both ſides.

(*a*) 11. Co. 16.

CASE 16.

Sir Matthew Mints' Caſe.

A pardon of all felonies before ſuch a day, with a ſpecial clauſe not to find ſureties for good behaviour, Sum. 53. Cro. Eliz. 814. 2. Hawk. P. C. 556.

UPON the *fourteenth* of *November* 1640, *Sir Matthew Mints* ALIAS *Ments*, Knight of the Bath, was convicted of manſlaughter of one *Weeks*, who was his ſervant, by beating or correcting of him, whereby he was ſo bruiſed that he inſtantly died, and had his clergy, and his burning in the hand was reprecludes the liability of finding ſuch ſecurity for miſdemeanors commited after the day.

pited:

pited: and now he pleaded his pardon, whereby the burning in the hand for the manſlaughter, and all other felonies committed by him, *et alia malefacta*, before the eighth of *July* laſt, were pardoned; and there was a ſpecial clauſe, that he ſhould not find ſureties for his good behaviour (*a*); and the pardon bore date 31ſt *October* laſt: and although there were divers miſdemeanours committed by him after the ſaid eighth day of *July*, for which he deſerved to be bound to the good behaviour, yet he had his pardon allowed, and was diſcharged from finding ſureties, &c. MINTS' CASE. Strange, 816.

(*a*) *Vide* 5. & 6. Will. & Mary, c. 13. Strange, 1203.

Aſpye *againſt* ——. CASE 17.

PROHIBITION was prayed to be awarded to the Council of the marches of *Wales*, where it was by bill ſuggeſted, That a copyholder in fee ſurrendered into the hands of ſuch a tenant ſuch a tenement, held of the ſaid manor by *the verge*, to the uſe of the plaintiff; and that *Pembridge*, the ſteward of the manor, refuſed to admit him, and there prayed that he might be compelled to admit him: whereunto the defendant pleaded, that the cuſtom of the manor is to ſurrender into the hands of two tenants, and that the ſaid ſurrender ought to be done by *the verge*; and this ſurrender was only by *a knife*, ſitting at the table, and into the hands of one tenant only; and that he who made this ſurrender was dead: and his heir alledging that this ſurrender was void, deſired to be admitted; and was admitted: and that notwithſtanding this anſwer, they proceed to try the cuſtom, which is triable only at the common law.—Whereupon a prohibition was granted.

A prohibition ſhall go to the marches of *Wales*, if they proceed to try the cuſtom of a manor. Co. Lit. 61. a.

Sherman *againſt* Lylly. CASE 18.

Hilary Term, 15. *Car.* 1. *Roll* 1198.

DEBT upon an obligation of two hundred pounds, conditioned, That whereas *Lylly* had married ſuch a woman, being a widow, if the defendant ſhould permit his ſaid wife to make a will of her huſband's goods, to the value of one hundred pounds, *to be paid* within one year after her deceaſe, that then, &c. The defendant pleaded, that he permitted his ſaid wife to make a will; and thereupon the plaintiff demurred.

In debt on bond, conditioned that the defendant's wife ſhall deviſe 100l. &c. it is no plea to ſay ſhe did deviſe it, unleſs he ſhew alſo that he paid it. Ante, 220.

ROLLE, *Serjeant*, ſaid, that he ought to have pleaded that he paid accordingly; for otherwiſe he doth not anſwer to the condition, but only to one part thereof. Andrews, 28.

ALL THE COURT were of that opinion; for "*to be paid*" is all one with "*and to pay*," otherwiſe it is an idle thing to permit her to make a will, if he doth not pay; and therefore they all held, that the plea was ill. Wherefore it was adjudged for the plaintiff.

Burwell *againſt* Harwell. CASE 19.

Hilary Term, 15. *Car.* 1. *Roll* 197.

REPLEVIN. The queſtion upon demurrer was, FIRST, Whether the grantee of a rent-charge, by the conuſor of a ſtatute, after the ſtatute acknowledged, and after the time of the extent of the ſtatute, averring that the debt, damages, and coſts are *conuſee* be ſatisfied, *the grantee* may diſtrain; and if the goods be *replevied*, it may be tried, in *replevin*, whether ſatisfied or not. S. C. Jones, 456.

If the *conuſor* of a ſtatute, after recognizance, grant a rent-charge, and the

BURWELL *against* HARWELL.

satisfied, may distrain for the rent and arrears without suing a *scire facias*?—And after argument at the bar on both sides,

Cro. Eliz. 152. 4. Co. 67. Dyer, 1.

BERKLEY, *Justice*, delivered his opinion, that the distress was lawful, without a *scire facias*; for he did not meddle with the possession, but distrained for his rent: and he put a difference where a man makes a gift in tail, reserving a rent, and where a donor grants a rent out of a reversion; in the one case the rent may be docked and barred by recovery against tenant in tail; but in the other case it cannot be destroyed by recovery, but the rent shall remain at least as a rent-seck, &c.

BRAMPSTON, *Justice*, said, Peradventure he might enter and distrain; for where a man hath *profits à prendre*, as common for twenty beasts or twenty loads of estover every year, if he might not have them until *scire facias*, he should be at a great mischief.

And *I* was of the same opinion, that he might distrain, if he at his peril will take notice that the extent is determined, and the debt, damages and costs levied; and he cannot have a *scire facias*, because he hath no title by record whereupon to ground a *scire facias*.

A person who claims under a conusor by fine or other record cannot maintain a distress without a *scire facias*.

THE SECOND QUESTION upon the demurrer was, Whether one who claims by the conusor by fine or other record may maintain a distress without a *scire facias ad computandum*, as 38. *Edw.* 3. *pl.* 12. 25. *Edw.* 3. *pl.* 1. and *pl.* 37.? And in *Michaelmas Term* following it was argued

By SHAFTOE, *for the avowant*, that the distress was lawful, and that he might well maintain it, without a *scire facias ad computandum*.

And ROLLE, *Serjeant, for the plaintiff*, much insisted, that forasmuch as the conusee comes in by matter of record, that without matter of record he cannot be ousted by one who claims under the conusor; and therefore the grantee cannot distrain without first suing a *scire facias*.

Co Lit. 315. b. Yelv 12. Moor, 662.

BERKLEY, *Justice*, answered, That true it is, none who claims estate in land under the conusor, after the statute acknowledged, can enter or avoid the extent without a *scire facias* or *venire facias ad computandum*; wherein, if it appear that he hath taken the profits of the land after the time of the extent satisfied, he shall be allowed for them, and shall answer for the profits so tortiously taken: but grantee of a rent, after the extent satisfied, may well distrain; so may grantee of a common; for they claim no interest in the land, but profits out thereof: wherefore he cannot have a *scire facias* or a *venire facias ad computandum*; for he ought not to account with them, and therefore may distrain or put in his cattle to take the profits, otherwise he should be without remedy; for which, &c.

And *I* was of the same opinion; and that the rule holds not always good, that where one comes in by matter of record, he ought not to be ousted without a *scire facias* or matter of record: for he whose lands are extended upon an *elegit* upon a recognizance, after the debts are satisfied, may enter without *scire facias*; but the conusee of a statute (because he is to have costs or damages, which are not known) cannot be ousted without a *scire facias*: wherefore, &c.

4. Co. 67. b.

And, the other Justices *being absent*, rule was given, that judgment should be entered for the avowant, unless, &c.

—— *againſt* Stringer. CASE 20.

Hilary Term, 15. *Car.* 1. *Roll* 2.

TRESPASS for breaking his cloſe in *Culham*, &c. The defendant pleads, as to the breaking of parcel thereof in *Culham*, containing forty-two acres, that *Sir John Priſot* and his wife were ſeiſed of the manor of *Culham*, and of the ſaid forty-two acres, parcel of the ſaid manor, and of a meſſuage and two yard-lands, parcel of the ſaid manor, in right of his wife for her life, remainder over to *J. S.*; and that they joined in a fine *ſur conuſance de droit come ceo*, &c. of the ſaid meſſuage and two yard-lands to the defendant, and granted them to the defendant and his heirs; and further by the ſaid fine granted to him common for four horſes and five beaſts, and two hundred ſheep in the ſaid manor and lands in *Culham*; and avers the life of the ſaid huſband, and that he put in his cattle to uſe the common, &c. AND as to his breaking the other part of the cloſe he pleads and ſhews a leaſe for ninety-nine years.

A grant of common within the manor of *A.* is good, although it does not appear that there are *waſtes* within the place when *common* is granted.

Co. Lit. 122. a. 1. Roll. Ab. 399. 403. Cro. Jac. 27. 2. Mod. 185.

Upon theſe pleas the plaintiff demurred; and it was ſhewn for cauſe, That the firſt plea is not good, becauſe he doth not plead that it was waſte or common, &c. otherwiſe he might not claim common, unleſs in land commonable.

BERKLEY, *Juſtice*, and MYSELF held, that it was no cauſe of exception; but by the plea, as the fine is, he may claim common in any part of the manor; for there is not any reſtraint to the waſtes or commons, but it is granted generally in his manor, and not like to the caſe in THE YEAR-BOOK 9. *Hen.* 6. grant of common *ubicunque et quandocunque averia ſua ierint*, for there he ought to aver that the cattle of the grantor went in the ſame place.

1. Roll. 403.

BERKLEY ſaid, the clauſe of *quandocunque averia ſua ierint* is void, becauſe it reſtrains all the effect of the grant; for if the grantor will not put in his cattle, he never ſhall have his common.

I hold the ſaid reſtraint to be good, for he ſhall not have it but when the grantor hath cattle there; and he is not totally reſtrained: and *modus et conventio vincunt legem*; for it is not intendable that the grantor would totally forbear to put in his cattle to defraud the commoner of his common.

But for the principal point WE BOTH AGREED, *cæteris Juſtitiariis abſentibus*, to give judgment for the defendant, that that part of the plea was good.

But for the other part, wherein the leſſee preſcribes to have common, it is clearly ill. Wherefore it was adjudged for the plaintiff, that this plea was not good.

A leſſee for years cannot *preſcribe for a right* of common; but muſt plead the *que eſtate*. Latch. 161. 1. Sid. 313. Lutw. 1359. 5. Com. Dig. 336. 1. Salk. 169.

Hilary Term,

16. Car. 1. In the King's Bench.

Sir John Brampſton, *Knt. Chief Juſtice.*

Sir George Croke, *Knt.*
Sir Robert Berkley, *Knt.* } *Juſtices.*
Sir Robert Heath, *Knt.*

Sir John Banks, *Knt. Attorney General.*
Sir Edward Herbert, *Knt. Solicitor General.*

CASE 1.

Heath, J. ſucceeds to the king's bench upon the death of *Sir W. Jones.*

Memorandum.

SIR WILLIAM JONES, *Knight*, one of the Juſtices of the king's bench, died at his houſe in *Holborn* upon the ninth of *December*, and, according to his own appointment, was buried in the walks under *Lincoln's-Inn* chapel. SIR ROBERT HEATH, one of the King's Serjeants, was appointed to be Juſtice of the King's Bench in his place. And upon the firſt *Tueſday* in Term, the ſaid SIR ROBERT HEATH was ſworn Juſtice of the King's Bench.

CASE 2.

The promotions of *Littleton, C. J. Banks, A. G. Mr. Herbert*, and *Mr. St. John.*

Memorandum.

THE firſt day of this Term, being *Saturday*, SIR EDWARD LITTLETON, *Knight*, who was Chief Juſtice of the common pleas, was deſigned and appointed to be Lord Keeper of the Great Seal: and (having had the ſeal delivered to him by the king, at *Whitehall*, the *Wedneſday* before, and ſworn there the ſame day to be Lord Keeper thereof by the Lord Treaſurer and the *Earl of Pembroke*, Lord Chamberlain) ſigned divers writs in the interim betwixt that and the Term.

If the Chief Juſtice of *C. B.* be made Lord Keeper of the Great Seal, ſtill he continues Chief Juſtice. Ante, 127. 138.

1. Sid. 338. 1. *Hen.* 7. pl. 10. b.

SIR JOHN BANKS, *Attorney General*, was deſigned by the king to be Chief Juſtice of the common pleas; and divers Lords and others accompanied him to *Weſtminſter*; and all the Juſtices and Barons, and Maſter of the Rolls attended the ſaid Lord Keeper to *Weſtminſter*, and yet notwithſtanding he continued Chief Juſtice of the common pleas; and upon *Wedneſday, quindena Hilarii*, the ſaid Lord Keeper ſat in the common pleas as Chief Juſtice there, not in his robes, but in his long gown and hat, as the Lord Keeper uſeth to ſit, and ſwore a philizer there, which office he gave as Chief Juſtice of the common pleas, and afterwards went into chancery.

And then SIR JOHN BANKS appeared before him, by virtue of a writ returned to him, to take the degree of a ſerjeant at law: and after a ſpeech made to him by the Lord Keeper, and his anſwer of humble thanks to the king for his grace and favour, he was ſworn Serjeant, and after went into the king's bench, and made a motion within the bar as king's attorney; and the next day, being *Thurſday*, he performed his ceremonies in *Serjeants-Inn-Hall*, in *Fleet-ſtreet*, and went to *Weſtminſter* in his party-coloured robes, with the Warden of the *Fleet*, and other officers attending upon him, and kept his feaſt in *Serjeants-Inn-Hall*; and the next day, being *Friday*, he was ſworn Chief Juſtice of the common pleas.

And afterwards, the ſame day, HERBERT, the King's Solicitor, was made Attorney General, and MR. ST. JOHN, of *Lincoln's-Inn*, was made the King's Solicitor.

Chambers

Chambers *againſt* Sir Edward Brumfeild, late Mayor of London.

CASE 3.

TRESPASS of falſe impriſonment for committing the plaintiff to the priſon at *Newgate*.

The writ to levy ſhip-money declared illegal. Ante, 524.

The defendant juſtifies by virtue of the king's writ, dated 4th *Auguſt*, 11. *Car.* 1. for not paying of money aſſeſſed upon him towards finding of a ſhip.

Being argued at the bar this Term, it was now moved to have judgment without any further argument, becauſe it had been voted and reſolved in the upper houſe and the houſe of commons, *nullo contradicente*, that the ſaid writ, and what was done by colour thereof, was illegal.

The Court therefore would no further diſpute thereof, but gave judgment for the plaintiff.

Lord Grey's Caſe.

CASE 4.

IN this parliament a queſtion was moved concerning the barony of *Ruthen*.

A baron *by writ* being *created* an earl to him and the heirs male of his body has iſſue two ſons by ſeveral *venters*, the eldeſt of whom had iſſue a daughter; the *barony* ſhall go to the daughter, and the *earldom* to the ſecond ſon.

The caſe was, That one being created a baron to him and his heirs, hath iſſue a ſon and a daughter by one *venter*, and a ſecond ſon by another *venter*, and the eldeſt ſon hath the barony, and ſits in parliament, and afterwards dies without iſſue.

The queſtion was, Whether the ſecond ſon ſhall have that dignity as heir to his father, or the ſiſter ſhall have it as *poſſeſſio fratris* in lands, &c.? and they deſired to have the opinion of the Judges therein.

And all the Juſtices reſolved, that there is not any *poſſeſſio fratris* of a dignity, but it ſhall deſcend to the ſon; for the younger ſon is *hæres natus*, and the ſiſter is only *hæres facta*, by the poſſeſſion of her brother, of ſuch things as are in *demeſne*, but not of dignities and ſuch like, whereof there cannot be an acquiſition of the poſſeſſion, according to *Co. Lit.* 15. *b.* and 3. *Co.* 42. *a. Ratcliff's Caſe.*

3. Co. 42. W. Jones, 16. See Hal. MSS. in Mr. Hargrave's Co. Lit. Claims of Honour, 255. 272. Selden's Works, 3d vol. 1713. and 3. Com. Dig. 63.

note (3), p. 15. b. where this caſe is differently reported and explained. See alſo Collier's

Gertrude Bacon *againſt* James Bacon and Three Others.

CASE 5.

Trinity Term, 16. *Car.* 1. *Roll* 456.

TRESPASS for breaking his cloſe in *Cramford*. Upon not guilty pleaded, a ſpecial verdict was found, That

Children born abroad of Engliſh parents are conſidered as natural-born ſubjects; and the daughter of an Engliſhman, though born abroad, may be an Engliſh parent.

Thomas Bacon, late of *Cramford* aforeſaid, was ſeiſed in fee of the tenements in the declaration mentioned, and had iſſue *John* and *Thomas*, and 15th *October* 1610 died ſo ſeiſed, which deſcended to the ſaid *John*; who, being a merchant, went beyond ſeas to *Elvin*, in *Pruſſia*, which is in the dominions of the king of *Poland*, to merchandize, and uſed the trade of a merchant there; and during his trading eſpouſed there *Elizabeth* the daughter of *Francis Cockley*, an *Engliſhman*, who exerciſed the trade of a merchant *in partibus tranſmarinis*: and that 31ſt *Auguſt* 1615 the ſaid *John Bacon* died, the ſaid *Elizabeth* his wife being *groſſment enſcint* with the ſaid *Ger-*

Vaugh. 279. 7. Co. 18. 1. Sid. 198. March. 150. Lit. Rep. 26. 1. Vent. 413. 427. Cro. Eliz. 3. 1. Com. Dig. 297. 1. Bac. Abr. 77.

trude,

BACON *againſt* BACON, and THREE OTHERS.

trude, now the plaintiff, which *Gertrude* was born the 31ſt *October* 1615, at *Elvin* aforeſaid; and that the ſaid *Thomas Bacon* was brother of the whole blood to the ſaid *John*; and that the plaintiff is the ſole daughter and iſſue of the ſaid *John*; and that ſhe, the plaintiff, entered into the ſaid tenements, and was ſeiſed *prout lex poſtulat*; and the ſaid *James*, as ſon and heir of the ſaid *Thomas Bacon*, entered and ouſted her, and continued the poſſeſſion, *prout* in the declaration, &c. *Et ſi ſuper totam materiam, &c.* the Court ſhall adjudge for the plaintiff, they find for the plaintiff, and aſſeſs damages twelve ſhillings and coſts; and if, &c.

See the Caſe of Durore v. Jones, 4. Term Rep. 300.

BRAMPSTON, BERKLEY, and MYSELF, after this had been argued at the bar, agreed, that judgment ſhould be given for the plaintiff; for her father being an *Engliſh merchant*, and living beyond the ſeas for merchandizing, his daughter is born a denizen, and ſhall be heir to him: and it is not material although his wife be an alien, for ſhe is, as BERKLEY ſaid, *ſub poteſtate viri*, and *quaſi* under the allegiance of our king. And, as BRAMPSTON ſaid, although the civil law is, that *partus ſequitur ventrem*, yet it is not ſo in our law; but the child ſhall be of the father's condition: and he being an *Engliſh* merchant, and reſiding there for merchandizing, his children ſhall, by the common law, or rather, as BERKLEY ſaid, by the ſtatute of 25. *Edw.* 3. ſt. 2. (*a*) be accounted the king's lieges, as their father is. And they all agreed the ſooner in this opinion, by reaſon of a caſe vouched to be adjudged 2. *Car.* 1. which I remember was argued in the duchy court before HOBART and YELVERTON, *Juſtices*, aſſiſting there; where one *Stephens*, being a merchant, went over the ſeas and reſided for his merchandizing, and there had children, they reſolved, by the advice of the other Juſtices, that thoſe children were denizens; and it is entered there accordingly. And ſo in this caſe it was agreed, and judgment was given for the plaintiff.

Cro. Jac. 3.

7. Co. 18. a.

Co. Lit. 8. a. Mr. Hargrave's note (1), and 128. b.

(*a*) See 7. Ann. c. 5. 4. Geo. 2. c. 21. and 13. Geo. 3. c. 21.

CASE 6.

Prinſor's Caſe.

An arreſt cannot be made on a *Sunday* upon proceſs for good behaviour.

EDWARD PRINSOR, conſtable of *Offenham*, was brought into court upon an attachment of contempt; where it appeared by his examination, that he had arreſted one *Anthony Haſtewood*, *Eſq.* in the church-yard, upon a *Sunday*, as he came from divine ſervice, by a proceſs for the good behaviour (*a*), out of the ſeſſions, when the ſaid *Anthony Haſtewood* ſhewed him, that he had a *certiorari* out of this court. But he, pretending that he could not read, arreſted and detained him, until he went to another houſe, and procured it to be read to the ſaid *Prinſor*, who then diſcharged him.

Ante, 395.

10. Co. 76. b. Raym. 250. 5. Mod. 449. 2. Salk. 672. 1. Mod. 56. 3. Bac. Ab. 39. 2. Term Rep. 269. 3. Term Rep. 799.

And for this contempt, becauſe he was arreſted upon a *Sunday*, immediately after divine ſervice, whereas he might have arreſted him upon any day of the week, the ſaid *Prinſor* was fined twenty ſhillings: and for arreſting and detaining him after the writ of *certiorari* ſhewn (his ignorance not excuſing him), he was ordered to be bound with ſureties to the good behaviour.

An officer is juſtified under proceſs of the ſeſſions, although it be irregularly iſſued.

But the fine and impriſonment were diſcharged, becauſe the arreſt was by proceſs of the ſeſſions of peace, although the Court declared, it was not well awarded according to the ſtatute of 21. *Jac.* 1. c.

Ante, 395.—10. Co. 76. 2. Roll. Abr. 560. 1. Vent. 220. 273. Lutw. 1563. 3. Com. Dig. 490.

(*a*) See 29. Car. 2. c. 7.

Kings

Kings *againſt* Hilton and his Wife.

CASE 7.

Trinity Term, 16. *Car.* 1. *Roll* .

DEBT againſt huſband and wife, adminiſtratrix of her former huſband, in which judgment was given againſt them.

If a *man* marry an *adminiſtratrix* to a former huſband, who has waſted the aſſets during her widowhood, *he* ſhall be liable to the debts of the inteſtate; for it ſhall be conſidered a *devaſtavit* in *him*, Ante, 519.

Upon a *fieri facias* awarded, the ſheriff returned *nulla bona*, *&c.* of the inteſtate. Hereupon another *fieri facias* was awarded againſt the huſband and wife, with a clauſe in the writ, that if it be found, that the ſaid huſband and wife *devaſtaverunt bona et ſi conſtare poterit, tunc fieri facias*, *&c.* (*a*). And the ſheriff returned, that *they* had not in their hands any of the goods of the inteſtate; but that the wife, being adminiſtratrix to her firſt huſband, had goods of the value of one hundred pounds of the ſaid inteſtate, and had waſted them during her widowhood (*b*), and the huſband had not waſted any of them; *et ſi devaſtaverunt* according to the writ, the jury prayed the diſcretion of the Court.

1. Roll. Ab. 931. 1. Lutw. 672. Moor, 761. 1. Com. Dig. 256. 565.

ROLLE, *Serjeant*, argued, *for the plaintiff*, that it was a devaſtation in both.

And THE COURT held, that the ſheriff's return of the inquiſition finding this matter was good enough. Wherefore it was adjudged for the plaintiff. 1. *Sid.* 337.

(*a*) See Petiſer's Caſe, 5. Co. 32. (*b*) See 30. Car. 2. c. 7. 3. Mod. 113.

Ball *againſt* Trelawny.

CASE 8.

Eaſter Term, 16. *Car.* 1. *Roll* .

BILL againſt the defendant *in cuſtodiâ mareſchalli*, upon the 2. *Hen.* 4. c. 11. (*a*) for ſuing in the admiralty court upon a contract made *on the land* at *New England*, and not *ſuper altum mare*; where the defendant had obtained judgment in the admiralty court, and taken the party in execution for 112*l.*; and a verdict was here found for the plaintiff.

An action for ſuing in THE ADMIRALTY where the cauſe ariſes upon land may be brought *by bill*, notwithſtanding the 18. *Eliz.* c. 5.; but it muſt be ſtated *in partibus tranſmarinis*. Ante, 296.

HALES moved in arreſt of judgment, FIRST, For that the ſuit is by bill, and not by original writ, as the ſtatute 18. *Eliz.* c. 5. appoints. —But in regard it was returned that he was *in cuſtodiâ mareſchalli*, and he could not otherwiſe have his remedy, it was held to be well enough.

SECONDLY, For that, being at *New-England*, it was not alledged to be *in partibus tranſmarinis*.

1. Roll. Ab. 537. 4. Inſt. 134. Hob. 11. Strange, 1045. 1. Com. Dig. 228.

And the Court, *viz.* BRAMPSTON, BERKLEY, HEATH, and MYSELF held, that it is out of the admiral's juriſdiction, and that he hath no authority to meddle therewith. Wherefore it was adjudged for the plaintiff.

The *Friday* following he appeared upon an *habeas corpus*; and this cauſe being returned, and that he was in execution for this cauſe only (which they held to be *coram non judice*), the party was diſcharged.

(*a*) See alſo 13. Rich. 2. c. 5.

Die

Die Martis 12° *Novembris* 1667.

Report of the Committee concerning Freedom of Speech in parliament.

UPON a report made by *Mr. Vaughan* from the Committee concerning Freedom of Speech in Parliament,

RESOLVED, &c.

THAT the Houſe do agree with the Committee, that the act of parliament in 4. *Hen.* 8. c. 8. commonly intituled, "An act "concerning *Richard Strowd*," is a general law (*a*), extending to indemnify all and every the members of both houſes of parliament, in all parliaments, for and touching any bills, ſpeaking, reaſoning, or declaring of any matter or matters in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and neceſſary rights and privileges of parliament (*b*).

Pryn's Anim. 13.

(*a*) See Ruſhworth, p. 662. where in the 5. Car. 1. this ſtatute was reſolved by all the Judges to be a particular law: but by 13. Car. 2. c. 1. it is provided, that nothing in the ſaid act ſhall extend to deprive either Houſe of Parliament, or the Members thereof, of their juſt and ancient privilege of debating any matters propounded in either Houſe, or at any conference or Committee, or touching the repeal or alteration of any old, or propoſing any new law, or redreſſing any public grievance; but Members ſhall have the ſame Freedom and Privilege of Speech as before.

(*b*) By 1. Will. & Mary, ſt. 2. c. 2. it is declared to be one of the liberties of the people. See 1. Bl. Com. 164.

Die Sabbati 23° *Novembris* 1667.

RESOLVED, &c.

Ante, 182. 6. Hume Hiſt. 215, 216.

THAT the judgment given 5. *Car.* 1. againſt *Sir John Elliot*, *Denzel Hollis*, and *Benjamin Valentine*, in the king's bench is an illegal judgment, and againſt the freedom and privilege of parliament.

Die Sabbati 7° *Decembris* 1667.

RESOLVED, &c.

THAT the concurrence of the Lords be deſired to the votes of this Houſe concerning Freedom of Speech in parliament, and that a conference be on *Monday* next deſired to be had with the Lords, at which time the votes may be delivered, and reaſons for them given.

Die Jovis 12° *Decembris* 1667.

A MESSAGE from the Lords by *Sir William Childe* and *Sir Thomas Eſtcourt*.

MR. SPEAKER,

4. Com. Dig. 347.

THE Lords have commanded us to acquaint you, that they agree with this Houſe in the votes delivered them at the laſt conference concerning Freedom of Speech in parliament.

Die

Die Mercurii 11°. *Decembris* 1667.

NEXT the *Lord Chamberlain* and *Lord Aſhley* reported the effect of the conference with the houſe of commons yeſterday, which was managed by *Mr. Vaughan*, who ſaid, he was commanded by the houſe of commons to acquaint their lordſhips with ſome reſolves of their houſe concerning the freedom of ſpeech in parliament, and to deſire their lordſhips' concurrence therein.

In order to which he was to acquaint their lordſhips with the reaſons that induced the houſe of commons to paſs thoſe reſolves.

He ſaid, the houſe of commons was accidentally informed of certain books publiſhed under the name of SIR GEORGE CROKE'S REPORTS, in one of which there was a caſe publiſhed which did very much concern this great privilege of parliament, and which, paſſing from hand to hand amongſt the men of the long robe, might come in time to be a received opinion as good law.

The houſe of commons, conſidering the conſequence, did take care that this caſe might be inquired into, and cauſed the book to be produced and read in their houſe; and he thought the next and cleareſt way to inform their lordſhips was to read the caſe itſelf, which is *quinto Caroli primi Michaelmas Term*, which caſe was read as followeth:

"The King *againſt* Sir John Elliot, Denzel Hollis, and Benjamin Valentine.

"AN INFORMATION was exhibited againſt them by the Attorney General, reciting, That a parliament was ſummoned to be held at *Weſtminſter* 17. *Martii*, 3. *Caroli regis ibidem inchoat.* and that *Sir John Elliot* was duly elected and returned knight for the county of *Cornwall*, and the other two burgeſſes of parliament for other places; and *Sir John Finch* choſen ſpeaker: that *Sir John Elliot, machinans et intendens omnibus viis et modis ſeminare et excitare* diſcord, evil will, murmurings, and ſeditions, as well *verſus regem, magnates, prælatos, proceres, et juſticiarios, et reliquos ſubjectos regis, et totaliter deprivare et ſubvertere regimen et gubernationem regni* ANGLIÆ, *tam in domino rege quàm in conciliariis et miniſtris ſuis cujuſcunque generis, et introducere tumultum et confuſionem* in all eſtates and parts, *et ad intentionem* that all the king's ſubjects ſhould withdraw their affections from the king, the 23d of *February*, *anno* 4. *Car.* 1. in the parliament and hearing of the commons, *falsò, malitiosè, et ſeditiosè* uſed theſe words, "The king's privy council,

" his judges, and his counſel learned, have conſpired together to " trample under their feet the liberties of the ſubjects of this realm, " and the liberties of this houſe."

" And afterwards, upon the ſecond of *March*, *anno* 4. aforeſaid, the king appointed the parliament to be adjourned until the tenth of *March* next following, and ſo ſignified his pleaſure to the houſe of commons; and that the three defendants, the ſaid ſecond day of *March*, 4. *Car.* 1. *malitiosè* agreed, and amongſt themſelves conſpired to diſturb and diſtract the commons, that they ſhould not adjourn themſelves according to the king's pleaſure before ſignified; and that the ſaid *Sir John Elliot*, according to the agreement and conſpiracy aforeſaid, had maliciouſly *in propoſitum et intentionem prædictam*, in the houſe of commons aforeſaid, ſpoken theſe falſe, pernicious, and ſeditious words precedent, &c. and that the ſaid *Denzel Hollis*, according to the agreement and conſpiracy aforeſaid between him and the other defendants, then and there *falsò, malitiosè, et seditiosè*, uttered *hæc falsa, malitiosa, et scandalosa verba præcedentia*, &c. and that the ſaid *Denzel Hollis* and *Benjamin Valentine*, *ſecundum agreamentum et conſpirationem prædict.* &c. *ad intentionem et propoſitum prædict.* uttered the ſaid words upon the ſaid ſecond day of *March*, after the ſignifying the king's pleaſure to adjourn; and when the ſaid *Sir John Finch*, the Speaker, endeavoured to get out of the chair, according to the king's command, they *vi et armis manu forti et illicito* aſſaulted, evil-intreated, and forcibly detained him in the chair; and afterwards, being out of the chair, they aſſaulted him in the houſe, and evil intreated him, *et violenter manu forti et illicito* drew him to the chair, and thruſt him into it: whereupon there was great tumult and commotion in the houſe, to the great terror of the commons there aſſembled, againſt their allegiance, *in maximum contemptum* and to the diſheriſon of the king, his crown, and dignity, for which, &c. To this information the defendants appearing, pleaded to the juriſdiction of this court, that the Court ought not to have conuſance thereof, becauſe it is for offences done in parliament, and ought to be there examined and puniſhed, and not elſewhere. It was thereupon demurred, and after argument adjudged, that they ought to anſwer, for the charge is for conſpiracy, ſeditious acts and practices, to ſtop the adjournment of the parliament, which may be examined out of parliament, being ſeditious and unlawful acts, and this court may take conuſance and puniſh them. Afterwards divers rules being given againſt them, viz. *Sir John Elliot*, that he ſhould be committed to the *Tower*, and ſhould pay two thouſand pounds fine, and upon his enlargement ſhould find ſureties for his good behaviour; and againſt *Hollis*, that he ſhould pay a thouſand marks, and ſhould be impriſoned, and find ſureties, &c, and againſt *Valentine*, that he ſhould pay five hundred pounds fine, be impriſoned, and find ſureties."

Then Mr. Vaughan laid much emphaſis upon the word " *machinans et intendens*, &c." and then went on, " That the houſe of commons had not only read the caſe as it was in the book, but did look into the record, wherein the information itſelf they found ſome

ſome conſiderable differences from the print; as that the crime alledged conſiſting partly of words ſpoken in the houſe, partly of criminal actions pretended to be committed, the gentlemen accuſed pleaded ſeverally, namely, ſpecially to the words, and a ſeveral plea apart to the criminal actions; but the Court dealt ſo craftily that they over-ruled the whole plea, mingled together, and took it in general, ſo that perhaps whatſoever was criminal in the actions might ſerve for a juſtification of their rule, and might make it ſeem in time to become a precedent, and a ruled caſe againſt the liberty of ſpeech in parliament, which they durſt not ſingly and barefaced have done.

" The houſe of commons did take care to inquire what ancient laws did fortify this the greateſt privilege of both houſes, and they found, in the fourth year of HENRY THE EIGHTH, an act concerning one *Richard Strowd*, who was a member of parliament, and was fined at the ſtannary courts in the weſt for condeſcending and agreeing with other members of the houſe to paſs certain acts to the prejudice of the ſtannaries. This act was made occaſionally for him, but did reach to every member of parliament that then was or ſhall be, the very words being, *viz.* " And over that BE IT " ENACTED by the ſame authority, That all ſuits, accuſements, " condemnations, executions, fines, amercements, puniſhments, " corrections, grievances, charges, and impoſitions, put or had, " or hereafter to be put or had unto or upon the ſaid *Richard*, " and to every other of the perſon or perſons afore ſpecified, that " now be of this preſent parliament, or that of any parliament " hereafter ſhall be, for any bill, ſpeaking, reaſoning, or declaring " of any matter or matters concerning the parliament to be com- " menced and treated of, be utterly void and of none effect. And " over that BE IT ENACTED by the ſaid authority, That if the " ſaid *Richard Strowd*, or any of all the ſaid other perſon or per- " ſons, hereafter be vexed, troubled, or otherwiſe charged for any " cauſes as is aforeſaid; that then he or they, and every of them, " ſo vexed or troubled of or for the ſame, to have action upon " the caſe againſt every ſuch perſon or perſons ſo vexing or " troubling any contrary to this ordinance and proviſion, in the " which action the party grieved ſhall recover treble damages and " coſts, and that no protection, eſſoign, nor wager of law in the " ſaid action, in any wiſe be admitted nor received."

He ſaid, " It is very poſſible the plea of thoſe worthy perſons, *Denzel Hollis*, *Sir John Elliot*, and the reſt, was not ſufficient to the juriſdiction of the court, if you take in their criminal actions altogether; but as to the words ſpoken in parliament, the Court could have no juriſdiction while this act of 4. *Hen.* 8. is in force, which extends to all members that then were (or ever ſhould be) as well as *Strowd*, and was a public general law, though made upon a private and a particular occaſion.

He recommended to their lordſhips the conſideration of the time when theſe words in the caſe of SIR GEORGE CROKE's REPORTS

REPORTS were ſpoken; which was the ſecond of *March*, 4. *Caroli primi*, being in that parliament which began in the precedent *March*, 3. *Caroli* at which time the judgment given in the king's bench about *habeas corpus* was newly reverſed, which concerned the freedom of our perſons, the liberty of ſpeech invaded in this caſe; and not long after the ſame Judges (with ſome others) joined with them in the caſes of ſhip-money, invaded the propriety of our goods and eſtates; ſo that their lordſhips find every part of theſe words, for which thoſe worthy perſons were accuſed, juſtified.

If any man ſhould ſpeak againſt any of the great officers, as the chancellor or treaſurer, or any of the reſt recited in thoſe acts, as by accuſing them of corruption, ill counſel, or the like, he might poſſibly juſtify himſelf by proving of it; but in this caſe it was impoſſible to do it, becauſe thoſe judgments had preceded and concluded him, for he could make none but by alledging their own judgments which they themſelves had reſolved, and would not therefore allow to be crimes which they had made for laws.

He did inform their lordſhips, that the bill in the rolls hath another title than that he did mention, this being That that the clerks knew it by, rather than the proper title.

The words in the caſe are charged *ed intentione*, which ought not to be; for it is clear and undoubted law, that whatever is in itſelf lawful cannot have an unlawful intent annexed to it. Things unlawful may be made an higher crime by the illneſs of the intent: for inſtance, taking away my horſe is a treſpaſs only, but intending to ſteal him makes it felony: borrowing my horſe, though intending to ſteal him, is not felony, becauſe borrowing is lawful. And there were no uſe of freedom of ſpeech otherwiſe, for a depraved intention may be annexed to any the moſt juſtifiable action. If a man eat no fleſh, he may be accuſed for the depraved intention of bringing in the *Pythagorean* religion and ſubverting the *Chriſtian*. If a man drink water, he may be accuſed of the depraved intention of ſubverting the king's government, by deſtroying his revenue both of exciſe and cuſtoms.

No man can make a doubt but whatſoever is once enacted is lawful: but nothing can come into an act of parliament but it muſt be firſt offered or propounded by ſomebody; ſo that if the act can wrong nobody, no more can the firſt propounding; the members muſt be as free as the houſes. An act of parliament cannot diſturb the State, therefore the debate that tends to it cannot, for it muſt be propounded and debated before it can be enacted.

had been a ſtrange information againſt any member of parliament then for propounding ſo great an alteration in church and ſtate.

Beſides, religion itſelf began then to be altered, and was perfected in the beginning of *Edward* the ſixth's reign, and returned again to popery in the beginning of queen *Mary's*; and the proteſtant religion reſtored again in the beginning of queen *Elizabeth's*.

Should a member of parliament in any of theſe times have been juſtly informed againſt in the king's bench for propounding or debating any of theſe alterations? ſo that their lordſhips perceive the reaſons and inducements the houſe of commons had to paſs theſe votes now preſented to their lordſhips.

After theſe votes were read, *viz.*

RESOLVED, &c.

THAT the act of parliament 4. *Hen.* 8. commonly entituled, "An Act concerning *Richard Strowd*," is a general law, extending to indemnify all and every the members of both houſes of parliament, in all parliaments, for and touching any bills, ſpeaking, reaſoning, or declaring of any matter or matters in and concerning the parliament to be communed and treated of, and is a declaratory law of the ancient and neceſſary rights and privileges of parliament.

RESOLVED, &c.

THAT the judgment given 5. *Car.* 1. againſt *Sir John Elliot*, *Denzel Holles*, and *Benjamin Valentine*, eſquires, in the king's bench, was an illegal judgment, and againſt the freedom and privilege of parliament.

To both which votes the lords agree with the houſe of commons.

UPON conſideration had this day of a judgment given in the court of king's bench in *Michaelmas* Term, in the fifth year of king *Charles* the firſt, againſt *Sir John Elliot*, knight, *Denzel Holles*, and *Benjamin Valentine*, eſquires, which judgment is found to be erroneous; it is ordered, by the lords ſpiritual and temporal in parliament aſſembled, That the ſaid *Denzel Holles*, eſquire (now LORD HOLLES, *Baron of Ifeild*), be deſired to cauſe the roll of the court of king's bench wherein the ſaid judgment is recorded, to be brought before the lords in parliament by a writ of error, to the end that ſuch further judgment may be given upon the ſaid caſe as this houſe ſhall find meet.

A MESSAGE was ſent to the houſe of commons by *Sir William Childe* and *Sir Juſtinian Lewin*, to acquaint them, that the lords do agree to thoſe votes which were delivered at the conference yeſterday.

Die Mercurii 15° *April* 1668.

WHEREAS counſel have been this day heard at the bar, as well to argue the errors aſſigned by LORD HOLLES, *Baron of Iſeild*, upon a writ of error depending in this houſe, brought againſt a judgment given in the court of king's bench in 5. *Car.* 1. againſt the ſaid LORD HOLLES, by the name of *Denzel Holles*, eſquire, and others; as alſo to maintain and defend the ſaid judgment on his majeſty's behalf: upon due conſideration had of what hath been offered on both parts thereupon, the lords ſpiritual and temporal in parliament do order and adjudge, That the ſaid judgment given in the court of king's bench in 5. *Car.* 1. againſt the ſaid *Denzel Holles* and others, ſhall be reverſed.

The form whereof (to be affixed to the tranſcript of the record) followeth:

ET quia curia parliamenti de judicio ſuo de et ſuper præmiſſis reddend' nondum adviſatur, dies datus eſt tam prædict. GALFRIDO PALMER, *militi et baronet. qui ſequitur, &c. quàm prædict.* DENZEL *domino* HOLLES *coram eâdem curiâ uſque ad diem* MERCURII *decimum quintum diem* APRILIS *tunc proximum ſequentem apud* WESTMONAST. *in comitat.* MIDD. *de judicio ſuo inde audiend. eò quòd curia prædict. nondum, &c. Ad quem diem coram curiâ prædict. venit tam prædict.* GALFRIDUS PALMER *qui ſequitur, &c. quàm prædictus* DENZEL *dominus* HOLLES *in propriis perſonis ſuis. Super quo, viſis, et per eandem curiam nunc hic pleniùs intellectis omnibus et ſingulis præmiſſis, maturâque deliberatione inde habitâ, conſideratum eſt per curiam prædictam, quòd judicium prædict. ob errores prædictos et alios in recordo et proceſſu prædictis compertos revocetur, adnulletur, et penitùs pro nullo habeatur; et quòd prædict.* DENZEL *dominus* HOLLES *ad omnia quæ idem* DENZEL *dominus* HOLLES *occaſione judicii prædict. amiſit, reſtituatur.*

JO. BROWNE, *Cleric. Parliamentorum.*

A

TABLE

OF

CONTENTS.

A.

Abatement of Writs.

IN treſpaſs againſt huſband and wife the writ ſhall abate if the huſband died betwixt the day of *niſi prius* and the day *in banco*, - - Page 509

If one *coparcener* or *jointenant* die pending the writ, it ſhall abate, 574. 583

Acceptance.

Where it ſhall take away title of entry for a forfeiture, - - 96. 193. 234

Of a bond, or other ſecurity, before the day due, or after, whether it diſchargeth the bond, - - 85, 86

See Leaſes.

Accompt.

What plea ſhall be in bar, and what in diſcharge of an accompt, before auditors 116

Againſt one as guardian in ſoccage, whether he ought to recite the ſtatute of *Marlbridge*, - - - - 229

Action.

Actio moritur cum perſona, how to be underſtood, - - - - 540

Where it ſhall be brought upon the *privity of contract*, and where upon the *privity of eſtate*, - - 183, 184

Being tranſitory, it may be laid in any county, - - - - 444

Action upon the caſe, for falſely procuring one to be indicted of treaſon, 15, 16. 239

For laying felony to one's charge, 277. 286

In matter of deceit, where it lies, 141, 142

For miſuſing his horſe, - - 20

For reſcuing one out of execution, and whether it lies for the party debtee, 107

For falſely cauſing money to be twice paid, 141, 142

In *nature of a conſpiracy*, whether it lies againſt the one only, - 239, 271

How it ſhall be brought 286 315. 553. 554

For keeping a dog uſed to bite ſheep, 487

For keeping a dog uſed to bite hogs, and which killed an hog, - 254

Againſt an apparitor, for falſely citing one, *ex officio*, into the ſpiritual court upon pretence of fame, - - 291

For ſtopping ancient lights in an houſe 315

For ſtopping a water-courſe, which ran to his mill, - 499, 500. 575

For erecting a tallow-furnace by a chandler, to the annoyance of an innkeeper and his gueſts, - - - - 510

Againſt the bailiff of a liberty for ſuffering one, who was arreſted at the plaintiff's ſuit, to eſcape, - 329, 330

By an executor againſt the ſheriff, for not returning a writ executed *in vita teſtatoris*, 297

Whether it lies for a commoner againſt his lord or any other, who erects a warren in the land adjoining, and with conies eat up the common, - - 387, 388

For diſturbance of a commoner by incloſure, - - - - 432

Whether it lies in nature of a *valor maritagii*, 502. 503

For an hawk, - 544 545

Whether it lies againſt tenant at will for waſte done, - - - - 187

Whether it lies by huſband and wife, for wrong done to the eſtate of the wife during coverture, - - 438

Action of *trover and converſion*, whether it lies for money out of a bag, - 89

Whether it lies of a bond. What ſhall be ſaid a converſion thereof: and whether the date thereof ought to be ſhewn, 262, 545, 554

Whether it lies for the leſſor, if he grant over, &c. againſt a ſtranger, or the leſſee himſelf, for cutting and carrying away timber-trees, during the leaſe for years, 240

Whether it lies by the leſſee for life, for cutting the loppings, which were reſerved to the leſſee, upon excepting the trees to the leſſor, - - 437, 438
Whether *trover and converſion* of timber-trees lies for the bargainee of him in reverſion during the eſtate for life, being felled and carried away by tenant for life, or his grantee, - - - 274
Whether *trover and converſion* lies for cattle put to paſture at a weekly ſum, which are detained for not paying the paſturage 271
Trover againſt huſband and wife upon *trover* and *converſion* of goods to the uſe of them, 494, 495
Whether an action of *trover and converſion* is within the ſtatute of *limitations*, 333
Action of treſpaſs upon the caſe, *quod vi et armis cepit et chaſeavit* his cattle into the cloſe of *J. S.* for which, being *damage feſant*, he paid 40s. for amends to the ſaid *J. S.* - - - 325
Action upon the ſtatutes of hue and cry, how they ſhall be brought, 211, 212, 273
Whether a writ of error lies upon that action, - - - 142
Action upon the ſtatute of maintenance 232
Upon the ſtatute of *ſcandalum magnatum*, 135, 136
Action upon the caſe for words: if the words be uncertain, it lies not, - 283
For words ſpoken at two ſeveral days, if damages be entirely given, and the words ſpoken at one time be not actionable, how judgment ſhall be given, 237. 327. 328
Whether it lies for ſaying *J. S.* is the reputed father of ſuch a baſtard, - 436
Suſpicion is no good cauſe to juſtify the ſpeaking of ſlanderous words, - 52
For words ſlandering one's title 140, 141. 469
Special prejudice muſt be therein alleged, 141. 469
It is not within the ſtatute of 21. *Jac. of limitations*, - - - 141
For words in ſcandal of his place or office, 14, 15. 40. 192. 223. 229. 261. 459, 460. 510. 563
For words ſcandalizing his trade or living, 31. 211. 236, 237. 265. 270. 282. 317. 319. 382. 472. 515, 516. 570
For words whereby loſs of life or corporal puniſhment would enſue, 52. 92. 135. 140. 163. 197. 236. 268, 269. 277 282, 283. 288. 307. 318. 320. 321, 322. 324. 326, 327. 328, 329. 337, 378. 417. 474, 475. 480. 489. 509, 510. 512. 553. 572
For defamation and words of incontinency, 112. 155. 229. 261. 269. 285. 309. 322. 339. 393. 404. 436. 456, 457. 466. 486. 487

Adjournment.

How the adjournment of the Term, or any the returns thereof, is to be made, 11, 12. 27. 200. 460. 466
What day ſhall be the firſt day of the juſtices ſitting, after the adjournment, 200

Adminiſtration and Adminiſtrators.

To whom it ſhall be committed, 8. 9. 106.
Whether it belongs to the huſband after the wife's death, - - 106
Where it ſhall be ſaid to be granted generally, and where ſpecially, - 294
Where an adminiſtrator ſhall pay coſts, 219
Adminiſtrator ſued in the ſpiritual court, to make diſtribution of goods after debts and legacies paid, ſhall have a prohibition, 62, 63. 201, 202
Whether an adminiſtrator may have a *liberate* upon an extent ſued by the executor of the inteſtate, who died before the extent returned, and the *liberate* ſued, 451. 452. 457, 458, 459
Adminiſtrator *durante minore ætate*, bringing an action, need not ſhew that the other is *infra ætatem* 17 *annorum*, - 240
Adminiſtrator *durante minore ætate*, where his power determines, - 516

See Executors.

Admiralty.

Reſolutions upon the caſe of admiralty juriſdiction, - 296, 297. 603.

Ad quod damnum.

Sued for ſtopping an highway, and how to be proſecuted, - - 266, 267

Alien and Denizen.

Alien may be adminiſtrator, and take adminiſtration of leaſes, as well as of perſonal things, - - - 8, 9
The father a merchant living beyond ſeas, his child born there ſhall be a denizen, though the mother be an alien, 601, 602

Amendment.

Where it ſhall be of an original writ, and in what manner, - - 74
After iſſue 86. 92. 144, 145. 148. 203, 204. 278.
Of a record after verdict upon the miſpriſion of the *habeas corpora*, - - 32
Of records after writ of error brought, 86. 95. 574
Of the name of a juror, whether it may be by the ſtatute of 21. *Jac.* 203. 564
Of the *niſi prius* roll after verdict, where the entry of the *niſi prius* roll was *in placito tranſgreſſionis*, and the plea and iſſue were *in placito debiti*, - 274, 275
Of the record of a *poſtea*, whether it may be after the return thereof, - 338
In point of judgment, and after certificate thereof, upon a writ of error allowed 410
Upon miſpriſion of the clerk, after writ of error brought, - 574. 594. 595
The iſſue roll may be amended by the imparlance roll, but not *è converſo*, 46. 92
A record of *quo warranto*, amended two or three years after the entry, - 144

Where

Where it is the default of *the clerk* in *judicial proceſs*, there ſhall be amendment, 38

Amercements.

Where the amercement of the plaintiff ought to be ſeveral, and where but one, 178
An infant ought not to be amerced, 410
Whether for amercements in the leet and court baron, upon a diſtreſs, damages and coſts ought to be given to the avowant, 534, 535
Of a clerk, for altering a record, - 278
How amercements in the ſheriff's tourn ought to be eſtreated and levied, - 275

Annuity.

Whether it be a real or perſonal action, 171
Whether an annuity for life granted to exerciſe the office of ſteward or park-keeper, ſhall be determined by the determination of the office, - - 59, 60
Whether an annuity may be demanded by bill, - - - 171, 172
How the judgment in a writ of annuity ſhall be for the principal and arrearages; and how it ſhall be where it is againſt the heir, 436, 437

Appeal.

Whether it may be brought in the next Engliſh county for a murder in Wales, 247, 248
Of an order or ſentence from one place or court to another, which is there confirmed or reverſed. The order is made peremptory, - - - 350, 352
Appeal by the ſon and heir againſt his mother, for the death of his father, and judgment thereupon, - 531, 532

Appendant, Parcel, &c.

Where a new building, by encroachment upon the lord's waſte, was adjoined to an ancient meſſuage *anno* 33. *Eliz.* And in 19. *Jac.* 1. the ſaid meſſuage, *cum pertinentiis*, was demiſed for years; the ſaid new purpreſture not being found to have been uſed together with the houſe, paſſed not by the words *cum pertinentiis*, &c. 17, 18. 169
Whether land lying in *D.* four miles diſtant from the meſſuage of *J. S.* in *S.* yet always uſed and occupied with the ſaid meſſuage, ſhall paſs in a deviſe of the ſaid meſſuage, *cum omnibus et ſingulis pertinentiis*, &c. - - - 57
Whether land may be ſaid to be appertaining to an houſe in the king's caſe, where it hath been let and occupied together with it, - - - - 169

Arbitrament.

What ſhall be good, 216, 217. 226. 263. 383. 433, 434. 542
To pay money at a ſtranger's houſe, whether it be a good arbitrament, - 226
At what time the nomination of an umpire may be appointed, if the arbitrators cannot agree, - - - 263
Submiſſion to arbitrament by ſeveral bonds, where it ſhall be ſaid but one ſubmiſſion, 433, 434

Aſſets.

How the plaintiff ſhall have judgment upon aſſets found, - - 373
Whether it ſhall be aſſets by diſcent, where the father deviſeth his land to his ſon and heir, upon condition that he ſhall pay his debts, &c. - 17, 18. 161

Aſſigns.

Whether an aſſignee in truſt with others ſhall be charged by the receipt of his companions, or only upon his own receipt, 318
Of what covenants an aſſignee of a term ſhall take advantage by the common law, or by the ſtatute of 32. *Hen.* 8. c. 25. 137. 503. 580
How the aſſignee of a reverſion ſhall bring covenant againſt leſſee for years, - 215
Whether an aſſignee of an eſtate, to which a future uſe and contingent eſtate is annexed, may have benefit of the contingent uſe, - - - 358, 359
Aſſignee of a rent: with what covenants chargeable, - 24, 25, 221, 222
Aſſignee of a reverſion, of what covenants he ſhall take advantage, - 137

Aſſiſe.

Of what things it lies, - - 555
Of darrein preſentment, - 341
Of a rent, - 507, 508. 520, 521
Where an aſſiſe of *mortdaunceſter* lies of land demiſable. - - 563

Aſſumpſit, 345. 384.

What ſhall be ſaid a good conſideration in an *aſſumpſit*, - - 19, 70. 77
It lies not, being grounded upon a perſonal promiſe in a real contract, if the real contract be executed, - 415
Damages recovered in an *aſſumpſit* cannot be a bar to a debt upon a record or ſpecialty 6
In an *aſſumpſit* to pay a debt, the plaintiff muſt ſhew the cauſe of the debt; but not ſo upon an accompt, - 116
Whether it lies for rent upon a leaſe for years, upon a general *indebitatus*, - 343
In conſideration that he ſhall make a leaſe for years, a leaſe is made for years, rendering rent: if an *aſſumpſit* lies for the rent in arrear, - - - 415
Whether it lies preſently, where the contract is to pay at ſeveral days, and makes a failure at the firſt, - 241. 350
Whether one may plead in diſcharge thereof, without ſhewing how, - 384

Upon conſideration paſt is good, if it be upon the defendant's requeſt, - 409
To pay *tantum quantum meruit* for ſuch a thing, or for doing ſuch an act, where it ſhall be good, - 77. 573
To forbear a debt *paullulum tempus*, whether it be good, &c. - - 241
To forbear a debt *aliquo tempore*, and he alledges that he forbore for a year, if it be good, - - 409. 438
To pay money upon a ſimoniacal contract, 337. 353. 361
To pay money upon intereſt, &c. 272, 273
In conſideration that he ſhould deliver a general acquittance, he alleageth that he delivered a general acquittance to a ſtranger, to the uſe of the party, - 19
In conſideration that they ſhall accompt together; and the defendant, being found in arrearages, promiſed to pay, - 116
Aſſumpſit to pay for wedding apparel, to what apparel it ſhall extend, - 53
To give ſo much in marriage with his daughter as he gave with any other daughter, how to be expounded, - 186
Firmum facere to ſuch a woman ſuch a portion; whether it amounts to a warranting of ſo much, &c. - - 202
To pay ſo many French pieces, whether they be to be intended French crowns, 194, 195
See 384, 385, *in tit.* Conſideration *and* Time.

Attainder.

In a *præmunire*, how it ſhall relate, 172
Attaint lies in a writ of enquiry of waſte, 414

Attorney.

What privileges he hath, - 11. 389
How puniſhed for dealing falſely in his place, 74
Whether he ſhall have an action of debt for ſums which he laid out, as ſolicitor, in another court wherein he is not attorney, 160
For what ſums laid out by him he ſhall be allowed, - 107. 159, 160
Whether he ſhall maintain an action for calling him "*common barrator*," - 192
See in tit. Fines aſſeſſed, *and* Privileges.

Attornment.

Whether attornment to the grant of a reverſion may be by words of aſſent thereto, ſpoken to a mere ſtranger, and what ſhall be a good attornment, - 440, 441

Audita Querela.

What ſhall be a good ſurmiſe in an *audita querela*, - - 153. 214
Againſt whom it ſhall be brought, where one recovers debt and aſſigns the extent over, and afterwards releaſeth all judgments and executions, - - 214
Upon a judgment in treſpaſs by two, ſurmiſing that a third perſon was party to the treſpaſs, and after the judgment had made ſatisfaction for the ſame, - 443, 444
By three; where judgment is againſt all three, and one is only taken in execution, whether the two who were not taken in execution may join with him, - 443

Averment.

When it may againſt the words of a deed, 501
Where it ought to be ſpecially pleaded, 61
Where a general averment ſhall be allowed, 542, 543
That a recovery againſt *J. S.* for treſpaſs of battery in one county, and againſt *J. N.* for treſpaſs of battery in another county, is one and the ſame treſpaſs, - 444

Ancient Demeſne.

Whether it may be pleaded after imparlance, - - - 9
Cuſtom there, that the lands are deſcendible to the eldeſt daughter, - 484

Avowry.

If an avowry for part of a rent, and ſhews not how he is ſatisfied of the reſidue, is ill, - - - 104
Whether in an avowry for an heriot, the avowant ought to ſhew the kind of beaſt, and the price thereof, - 260
Where coſts and damages ſhall be allowed in an avowry, - 497. 532, 533, 534, 535

Authority.

When it ſhall be ſaid to be purſued, 213
What ſhall be authority to an executor to ſell after the death of tenant for life; and whether a ſurviving executor may ſell, 382

Award. *See* Arbitrament.

B.

Bankrupt.

What intereſt he hath in goods extended before the *liberate*, - 149. 166. 176, 177
How a debt due to a bankrupt by ſimple contract, and aſſigned to a creditor by the commiſſioners, ſhall be recovered, 187. 209
Whether an inn-keeper be within the ſtatute of bankrupts, - 549, 550
Whether a ſhoemaker be within the ſaid ſtatute, - - - 31
See tit. Bargain and Sale, *and* Copyhold.

Bargain and Sale.

Where, by cuſtom, copyholder in fee dying ſeiſed, his wife is to have it during her life: and he becoming bankrupt, the commiſſioners,

ſioners, by indenture inrolled, bargain and ſell the ſaid land: the huſband dies, the wife is admitted, and afterwards the bargainee admitted; whether the eſtate veſted in the bargainee before admittance, 568, 569

Baron or Peer. *See* Peer.

Baron of the Exchequer. *See* Judges.

Baron and Feme.

Where they ought to join in actions, 419. 437, 438. 505. 554. 594
Where they ought to be ſued jointly, 254. 417
Where he ſhall have the ſole action for beating his wife, - - 90, 91. 175
Huſband and wife are ſued to outlawry, and before the outlawry the *baron* or the *feme* appear: what ſhall be done, and how the appearance ſhall be entered, - 58, 59
Huſband and wife adminiſtratrix, recover debt and damages: the wife dies: the huſband ſhall not have *ſcire facias*, 208. 227, 228. 464
Huſband and wife executrix, how the judgment ſhall be upon a *devaſtavit* of the wife, 519. 526
Huſband releaſeth the ſuit of his wife, for defamation, in the ſpiritual court. It is a good releaſe *quoad* the coſts, but not *quoad* the defamation, - - 222
Huſband ſued by his wife in the ſpiritual court, inforced to pay his wife's coſts in ſuit againſt himſelf, - - 16
Huſband and wife ſued in treſpaſs; the huſband dies betwixt the day of *niſi prius* and day *in banco*: whether judgment ſhall be entered againſt the wife, - 509
Huſband and wife ſued in treſpaſs; the huſband is acquitted: whether the judgment ſhall be againſt both *quoad capiantur*, 406, 407. 513
Huſband copyholder in right of his wife forfeits it: whether the wife and her heirs, after the death of the huſband, ſhall be bound thereby, - - 7
Huſband ſeiſed in fee, makes feoffment to the uſe of himſelf and wife, and to the heirs of the ſurvivor of them; and afterward makes a feoffment of the ſame land, and dies: the wife enters: the feoffment of the huſband hath deſtroyed the contingent uſe of the fee, - - 102
Huſband and wife, jointenants in fee by purchaſe, during the coverture: the huſband ſole makes a leaſe for twenty-one years by indenture, rendering the ancient rent, and dies: whether it ſhall bind the wife, 22, 23
Huſband poſſeſſed of a leaſe for years, he and his wife join in a leaſe, rendering rent to them and the ſurvivor of them: whether the rent be good to the wife, 288, 289, 290
A wife, tenant for life of an hop-ground, dies immediately before their gathering, the huſband ſhall have them, - 515
Whether the huſband may deviſe the wearing jewels of his wife, 343, 344, 345, 346
They cannot be jointly charged for converting goods to their own uſe, 454. 494, 495
See tit. Feme.

Baronet.

Whether it be a name of dignity, and within the intention of the ſtatute of 1. *Edw.* 6. c. 4. - - 104. 371, 372

Barrator.

Action brought by *an attorney* for calling him *common barrator*, - 192
Indictments for barratry, - 340. 348

Bar to actions.

Bar certain to common intendment is good, 6. 195
If a replication be not good, yet if the bar be ill in ſubſtance, judgment ſhall be for the plaintiff, - - - 5
Being pleaded at large, where it may be anſwered by replication at large, - 384
In an action of *trover* for goods; that he recovered in treſpaſs for the ſame goods, 35, 36
Pleaded in debt upon an obligation, although it anſwers not preciſely to the condition, yet where good, - 195

Baſtard.

Who ſhall be accounted the *reputed father* of a baſtard child, - 341. 350, 351. 470
How a baſtard ſhall be provided for by the pariſh, or by the reputed father, purſuant to the ſtatutes of 18. *Eliz.* c. 3. and 3. *Car.* 1. c. 4. - 341. 350, 351. 436. 470, 471

Battail.

Battail gaged in a writ of right, - 522

Bail.

Falſely offered and inſufficient, how to be puniſhed, - - - 146
Bail ſufficient tendered to a ſerjeant, who by one was arreſted upon a plaint in *London*: whether the ſerjeant be bound to accept thereof; and what remedy for the party if he ſhould refuſe, - - 196
Bail granted upon *habeas corpus*, 507. 552. 558
Writ of error brought by the bail, for a judgment given againſt the principal, 562
Where a *capias* is ſued againſt the bail, and he taken in execution, without any *ſcire facias* ſued againſt him, it ſhall be error, 562
Writ of error brought by the principal and bail, for an error in the principal judgment, and execution againſt the bail; and therefore abated, - 408. 574, 575
Bail in the king's bench, how it differs from bail in the common pleas, - 481

Bailiff of Liberties.

Whether he may make an extent upon an *elegit*, and deliver the moiety, - 319
Where he ſhall juſtify and excuſe, where the ſheriff himſelf cannot, - 446, 447

Bill of Exceptions.

Where and when a bill of exception ſhall be for not admitting evidence; and what ſhall be done thereupon, - 342

Bill of Review.

Where it cannot lie, - 40. 312. 352

Bis petitum.

Where aided after verdict, - 302

Biſhop.

What grants or leaſes of biſhops ſhall bind their ſucceſſors, 16, 17. 47, 48, 49, 50. 256. 258. 279. 557
Of an ancient office, with an addition of a new fee which is confirmed; whether it ſhall bind the ſucceſſor for any part, 47, 48, 49, 50. 279. 557
May grant letters of inſtitution under any ſeal, and out of his dioceſe. - 342
His certificate of a couplement in loyal matrimony, - - - 351, 352

Brewers.

Whether they may be ſaid to be victuallers within the ſtatute of 21. *Hen* 8. c. . 113
Whether brewers and bakers be within the ſtatute of 5. *Eliz.* c. . for uſing a trade, &c. - - - 499

Brueria, what, 179.

Burning of Houſes.

Where it is felony, and where not, 337, 338

Borough Engliſh.

The cuſtom thereof expounded, 411, 412, 413

Bye-law.

What, and whom it ſhall bind, - 498

C.

Capias.

It cannot be awarded againſt the principal, without ſuing *ſcire facias* againſt the bail,
Where judgment ſhall be *ideo capiatur*, 178, 340. 406, 407
Capias omitted in an indictment of reculance; and therefore erroneous, - 505

Certificate.

"*De accouple in loyal matrimony*," how to be made, - - - 351
Of one being beyond ſeas, under the ſeal of the town where he was reſident, without oath, for the truth thereof, and one ſworn for the expoſition thereof, is not allowable, - - - 365

Certiorari.

Where it may be awarded to certify another *certiorari*, - - 91
Where it may be to certify an original, where an original is alledged to be certified, 91. 410
To remove an indictment of felony out of the cinque ports, how to be directed, 252, 253 264, 265. 291
To remove a record out of the king's bench into the chancery, whether allowable, 297, 298
Whether it may be directed into *Wales* to remove an indictment from thence, 331, 332

Chancery.

How ſaid to be always open, - 3
Its juriſdiction, - 190, 191
Whether it can give relief againſt dower, 191
Whether a decree in chancery ſhall not be re-examined upon bill of review, 40, 312
The proceedings there, upon a ſtatute ſtaple, 451, 452. 458, 459

Cheating.

With falſe dice, how to be puniſhed, 234
Judgment againſt one for cheating with falſe tokens, - - - 564

Churchwardens.

Elected by the pariſh and not by the parſon, 552
Writ awarded to the eccleſiaſtical court, for admitting him to his office, - 589
Where they ſhall have double coſts in ſuits againſt them, - 175 285. 467

Cinque Ports.

Their liberties, - - 247. 252, 253. 291
How writs ought to be directed thither, 252, 253. 264, 265. 291

Clergy.

Where it ſhall be taken away from one who robs a chamber in an inn of court, no perſon being in the ſaid chamber, but in other parts of the houſe, - 473, 474
If the principal prays his clergy, and hath allowance thereof, the acceſſary is to be diſcharged without being put to his book, 566, 567

Colluſion,

Colluſion, Covin, or Fraud.

Where it ſhall be intended without being found, - - 483, 484
Where it ſhall not be intended unleſs expreſsly found, - 550, 551

Commiſſion and Commiſſioners.

Commiſſion in the time of one king executed in the time of another before notice: whether it be not determined, and to what purpoſe it ſhall be good, - 97, 98, 99
Commiſſioners for eccleſiaſtical matters, how, and in what caſes, they ought to proceed, by fine or impriſonment, 113, 114. 220
See Court Eccleſiaſtical.

Common and Commoner.

Whether a commoner may kill conies eating up his common, - 387, 388
Common granted *ubicunque et quandocunque averia ſua fuerint*; what paſſeth thereby, 599
Common appendant cannot be ſevered from the ſoil by grant, - - 542
Common appurtenant to a manor, being certain, may be annexed to parcel of the manor, or may be ſevered from it, 432
Whether common appurtenant may be created by deed within time of memory, and whether it may be divided, - 482
Common granted to one in his manor and lands of *D.* The grantee may claim common in any part of the manor, - 599
None may entitle himſelf to any profit *à prender in alieno ſolo*, without grant or preſcription, - - 542

Common Recovery.

Againſt the king, not good, - 96
By an infant, how good, - 307
See Recovery.

Conditions.

What words ſhall make a condition, 128. 129. 455, 456
The performance of a condition precedent ought to be averred, - 195. 381
Condition of an obligation to enjoy ſuch lands; whether the obligor is to warrant it againſt unlawful titles, - 5
Condition to ſurrender upon forfeiture of payment of money at a day certain: the money is paid before the day; whether it be a good performance, - 284
Upon an obligation to perform all covenants, payments, and agreements in a leaſe: whether the obligor ought to pay the rent without demand, - - 76, 77
Leſſee for one-and-twenty years, upon condition that he ſhall not alien any part above three years, during the term; if otherwiſe the leaſe to be void: who lets for three years, and ſo from three years to three years, during the term of his life, if he lived ſo long: whether this were a breach of the condition, - 511, 512

Confeſſion and Avoidance.

Where one of the parties claim by a later grant from one and the ſame party, there needs not any confeſſion and avoiding his title, - - - 581
What ſhall be a good confeſſion and avoidance in a plea; and where it ſhall be good without traverſe, and where not, 325, 494

Confirmation.

Where it may enlarge an eſtate, or make an eſtate *in eſſe*, which was barred by a fine, - - - 478, 479
Of a leaſe by a parſon made in 9. *Eliz.* the confirmation being in 14. *Eliz.* by another patron and ordinary than were at the time of the leaſe made, yet good, - 38

Conſideration.

In *aſſumpſit*, 8. 19, 20. 178. 272, 273. 409
To raiſe uſes, - - 529
To forbear *paullulum tempus*, - 241
See *Aſſumpſit*.

Conſultation.

Granted for the probate of a will *quoad bona*, where the will is made of lands and goods, 165, 166, 391. 395
Whether it ſhall be granted without motion, if the defendant anſwer not to the prohibition, - - - 238, 239
See Prohibition.

Copyhold and Copyholder.

How a copyhold eſtate ſhall be pleaded, 190
What ſhall be ſaid to be a reaſonable fine for a copyholder to pay upon his admittance, 196
A copyholder by the common law, without ſpecial cuſtom, cannot make a leaſe for one year; but it is a forfeiture, - 233, 234
Whether copyholds be within the ſtatute *de donis*, - - 42, 43, 44. 45
Whether copyhold lands are liable to the ſtatutes of bankrupts, 549, 550. 568, 569
Copyholder by licence lets it by indenture, with divers covenants; and afterwards ſurrenders to the uſe of another: whether his aſſignee ſhall have benefit of the covenant, - - 24, 25
Copyholder for life ſurrenders to the uſe of another; and the lord accepts, and grants it to *ceſty que uſe* for his life: he dies; whether the firſt copyholder ſhall re-have it, - - - 205
Copyholder ſurrenders out of court; in whom the intereſt reſts, until he be preſented and admitted, 273. 283. 569, 570
Copyholder ſurrenders twenty acres into the tenant's hands, according to agreement upon condition, to be void, &c. and before

fore the time prefixed, he ſurrenders one of the twenty acres to another, and afterwards performs the condition: whether this ſecond ſurrender be good, 273, 274. 283, 284

Copyholder ſurrenders to the uſe of one out of court, upon condition to be void; and afterwards, before the condition performed, ſurrenders to the uſe of another: the condition is performed; the ſecond ſurrender is preſented, and the party admitted, the firſt never being preſented: whether it be good, 273, 274. 283, 284

Lord of a manor makes a leaſe thereof, and of a copyhold therein, by the name of ſuch a tenement: whether the copyhold be not determined, - - 521

Copyholder for life claims a cuſtom to cut down and ſell trees, &c. - 220, 221

See Surrender.

Coroners.

Coroner's inqueſt, of what perſons it ought to be taken, - - 134

Where a writ awarded to the coroners, where the ſheriff is plaintiff or defendant, be error, - - - 345, 346

Corporations.

What acts they may do without deed, 160

Where the miſnaming of a corporation ſhall make a deed or record ill, 160. 572. 574

Coſts and Damages.

Whether they may be aſſeſſed without verdict, 582

Where after ſpecial verdict the plaintiff diſcontinued: whether the defendant ſhall have coſts, - - 575

Where coſts and damages ſhall be allowed to avowants, - 497. 533, 534, 535

Where they ſhall be againſt an adminiſtrator, or an executor nonſuited, - 29. 219

The defendant ſhall have coſts, where the declaration is ill, - - 175

Coſts given *pro dilatione executionis* in a writ of error, - - 401

Coſts releaſed in the ſpiritual court by the huſband for the defamation of his wife, 222

Coſts paid in the ſpiritual court by the huſband for his wife, upon his wife's ſuing him there, - - 16

Where they ſhall be diſcharged by the general pardon, upon a ſentence in the ſpiritual court for defamation, and where not, 46, 47. 114

Where double coſts ſhall be upon a falſe ſuit againſt churchwardens and other officers, 175. 285, 286

Attaint brought by the plaintiff upon an action of battery, which had paſſed againſt him, and now the firſt verdict was affirmed: whether by the ſtatutes of 21. & 23. *Hen.* 8. c. . the defendant ſhall have any more coſts, - - 542

Covenant.

By what words made, and how to be conſtrued, - 128, 129. 207

Where the word "*provided*" in an indenture ſhall make a covenant, and where a condition, - - - 128, 129

In covenant one may aſſign ſeveral breaches; but not in debt upon an obligation for performance of covenants, 176

The breach of a covenant being in the time of an aſſignee, and an action brought by him, the covenantee cannot releaſe this action, - - 503

Whether a covenant ſhall bind an infant to be an apprentice, - - 179

Where covenants in deeds ſhall be ſaid to be diſtinct by themſelves; and where they ſhall relate and be expounded by precedent covenants, - - 107

How action of covenant may be brought by an aſſignee for not repairing an houſe; and what ſhall be ſaid to be a breach thereof, - - - 24, 25

Brought againſt an aſſignee or grantee, 188. 221, 222

Whether it lies againſt the leſſee, where he hath aſſigned over his eſtate, and the aſſignee is accepted for tenant, 188. 221. 580

Made by an aſſignee of a term for life, and by him in reverſion: whether the action ſhall be brought as aſſignee of both, or of him who hath the inheritance, - 285

Covenant to make ſurrender of a copyhold upon requeſt, - - 299

That land ſhall be of ſuch value yearly, and that he will ſtand ſeiſed, - 360

Covin. *See* Colluſion.

Counſel.

Aſſigned to one arraigned for felony, 147. 365. 483

What matters they may plead and give in evidence, - - 365

Where a perſon indicted ſhews any exception in law, any one not aſſigned may be of counſel for him, - - 147

Counts. *See* Declaration.

Courts.

The cuſtoms and precedents in every court are the laws of the court, - 527, 528

Of what cuſtoms the courts are bound to take cognizance, without ſpecial pleading, 562

The court ſhall not take cognizance of any errors upon the record, unleſs they be aſſigned, - - - 53

Where title appears for the king; whether the court is bound *ex officio* to award for him, - - - 590. 592

Of ſtar-chamber, its foundation and juriſdiction, - - 168. 531

To what purpoſe ſentences there ſhall bind, 56. 65

1. COURT OF CHANCERY. *See* Chancery.

2. COURT OF KING'S BENCH.

Its power, - 182. 209, 210. 330
Iſſue being joined in chancery, and the record delivered into the king's bench, may be well tried by *niſi prius* out of the king's bench, - - - 313

3. COURT OF THE COMMON PLEAS.

Its privileges for the ſerjeants and officers thereof, - - 11. 84, 85
Different manner of proceedings betwixt the king's bench and common pleas, 481. 528
Its ancient juriſdiction in granting prohibitions to court chriſtian, where they proceed in prejudice to the common law, 88

4. COURT OF THE EXCHEQUER.

May demiſe as well for life as for years the king's lands, under the exchequer ſeal, 513
See tit. Offices by Inquiſition.

5. COURT OF THE EXCHEQUER-CHAMBER.

Of what antiquity, - - 514
Whether an error in deed is aſſignable in the exchequer-chamber, - 514
In what caſes writs of error lie in the exchequer-chamber, 142. 286. 300. 464
See tit. Judges.

6. COURT ECCLESIASTICAL.

Whether they may deprive any of his office which he hath for life, - 65

7. COURT OF HIGH COMMISSION.

Its power, - 113, 114. 220. 582
How fines impoſed are to be levied, - 579

8. INFERIOR COURTS.

COURT OF REQUESTS, - 595. 596
COURT OF MARSHALSEA, - 318, 571
COURT OF THE STANNARIES in *Cornwall*; and their manner of proceeding, - 333
COURT OF THE MARCHES OF WALES; and its inſtitution and juriſdiction, 309. 531. 557, 558. 595
COURT OF THE ADMIRALTY, 296, 297. 603
COUNTY COURT, TOURN, and LEET. *See* Leet and Tourn.
Where the Court of PIEPOWDER ought to be held, and for what matters and contracts in markets and fairs, - 45, 46
Where the Courts Baron of ſeveral manors may be held at one place; and how they ſhall be good, and where not, - 367
See Amercement.
Where inferior courts in pleading ought to ſhew their authority and creation, 46
They cannot allow protections, *ley gager*, &c. - - - 112. 146
A *ſuperſedeas* awarded to an inferior court, becauſe an utter-barriſter was not ſteward, 79

Cum Pertinentiis. See Appurtenances.

Cuſtom.

How to be pleaded, - 347
What ſhall be good, 65. 196. 259, 260
The cuſtoms and precedents of the courts are the law in all courts, - 527, 528
Of what cuſtoms courts are bound to take cognizance, without ſpecial pleading, 563
Several cuſtoms for the payment of tithes, 113. 237. 339. 403, 404
Cuſtom to grant a freehold by copy; whether it be good, - - 200
Cuſtom of Borough Engliſh, how it ſhall be conſtrued, - - 411, 412
Cuſtom, that every one ſhall be conſtable in ſuch a village according to their habitations: whether it ſhall bind a privileged perſon, - - - 389. 585
Cuſtom amongſt merchants upon bills of exchange: what ſhall be good, and what remedy for non-performance, 301, 302
That a *feme covert* in *London* ſhall be ſued without her huſband, how to be expounded, - - - 68, 69
Cuſtom in *London* to arreſt upon plaint entered in the compter, without any other warrant; if good, and whether the ſerjeant ought to take bail, - 196
Where a cuſtom in *London* may be againſt a ſtatute, - - 347. 361

Curriers.

What leather they may ſell uncut, and to whom, - - - 588, 589

D.

Damages.

Where they ought to be entirely given, and where not, - - 20, 21. 186 424
Entire, for words ſpoken at ſeveral times, 236, 237
Where damages found againſt one defendant ſhall bind the other, - 54, 55. 192, 193
Where they may be ſeverally given againſt defendants, and ſhall be recovered accordingly againſt them; and where the plaintiff ought to have but damages of one only, - - 54, 55. 243
Recovered in an *aſſumpſit*, cannot be a bar to a debt upon a record or ſpecialty, 6
Where conditional damages may be given by the jury, - - 32, 33. 143

Whether

Whether they ſhall be enquired by the ſame jury, where a demurrer is upon the evidence, or ſhall be enquired of after judgment by a writ of enquiry, - 143
Damages awarded in a writ of error upon judgment affirmed, according to the loſs which the party ſuſtained by not having his execution, - - 145
Where damages and coſts ſhall be aſſeſſed or increaſed by the court, - 175. 561
Whether treble damages may be given by a juſtice of peace upon the ſtat. of 23. *Hen.* 6. *of Extortion*, - - 438. 448
Where a penalty is given by a ſtatute, there ought not to be any more given for coſts or damages, - - 560
Where a ſtatute gives a penalty certain, and gives an action of debt, if the defendant doth not pay it, but inforceth the party to ſuit, he ſhall recover his damages due by the ſtatute upon demand, and his coſts alſo, - - - 560
Vide tit. Coſts.

Darrein Preſentment. *See* Aſſiſe.

Daughter.

A daughter performs the condition to pay money upon a mortgage; a ſon is born after: whether the daughter may retain or the ſon may *ouſt* her, - 87
Cuſtom in ancient demeſne, that lands are deſcendible to the eldeſt daughter, 424

Day.

No day ſhall be given to a defendant againſt whom a verdict is found, - 236
Feme ſole recovers in an action, and before day *in banco* takes huſband; ſhe notwithſtanding ſhall have judgment, - 232
Whether it may be given againſt one defendant upon verdict, where day is given unto the other until the next Term upon demurrer, - - 235, 236
Where it may be given until the next court, without mentioning a day certain, 254
How acts done in Term-time ſhall relate to the firſt day of the Term, - 102
How the days in Term ſhall be reckoned, and to what purpoſe, - 13
Quarto die poſt of the return is properly the day for ſitting, and not before, . 14. 102
Idem dies ſhall not be given to any who make default, - - 341

Death.

Whether the death of one of the defendants before judicial proceſs awarded becauſe of error, - - - 426. 574
Whether, when one ſues a judicial writ and dies, it being ſerved by the ſheriff and returned afterwards, be good, 450, 451, 452. 458, 459
See tit. Abatement of Writs.

Decem Tales. See *Tales.*

Declaration and Counts.

Where they ought to ſhew the beginning of the particular eſtate, - - 571
Where it is but conveyance to the action, it needs not be ſo preciſe as in a plea, 139
Whether it be good, although not warranted by the original writ, 272. 281, 282. 327
Declaration ill, becauſe it therein appears that the action was brought before there was any cauſe of action, - 575
Where it needs not be filed, - 532
Where it ſhall be made good by the plea in bar, - - - 288
Where, being uncertain, it is made good by the verdict, - 420. 497. 531
Where it ſhall be good if it hath ſufficient ſubſtance, although it be not according to the uſual form, - 209
Not good if by way of recital only, and not direct affirmative, - - 353
Whether in covenant it may be *per teſtatum exiſtit*, - - 188
Whether in the annuity for life, it ought to be in *dominico ſuo ut de feodo*, 186
Whether in an ejectment it be good, although it wants *vi et armis*, - 407
Whether in treſpaſs *vi et armis*, and not ſaying *contra pacem*, it be good, - 325
Whether in debt upon an obligation, and doth not ſay, *quod per ſcriptum obligatorium conceſſit*, it be good, - - 209
Where in an *andita querela*, although vicious, it ſhall be good, if the writ comprehend matter ſufficient, - - 151
Where it ought to have preciſe certainty, 507. 443. 497
In an ejectment of an hundred acres of Bog *in territoriis de Ireland*, - 511, 512
De piſcaria in *Ireland*, - 492
In an action upon the caſe, for ſtopping a water-courſe, - 499, 500
See tit. Error *and* Judgment.

Deeds.

How they ought to be expounded, 230. 386. 417. 548
To what time a deed ſhall relate, being delivered by three at one time, and by a fourth at another, - - 263
If raiſed by the party himſelf after delivery: whether the intereſt thereby conveyed be as well determined as the deed itſelf, 399
Whether if pleaded and miſ-recited in ſubſtance it be ill, - 426. 427
See tit. Grants, *and Monſtrans de Faits.*

Default.

Where the default of one defendant ſhall prejudice the other, - 251
After default, the iſſue and pleading are out of the court, - - 517

Defence.

How it ought to be made in a writ of right, 310, 311

Demand.

Of rent, how, and at what time, it ought to be, - - - - 76, 77
Of a rent-ſeck, where it ſhall be made, 508. 521

See more in Requeſt.

Demiſe of the King.

What acts ſhall be determined by the king's demiſe; and what ſhall ſtand good until notice, &c. - 1, 2. 97, 98.
Whether it ſhall abate or diſcontinue original writs, upon a penal act brought by the informer for the king and himſelf, 10, 11

Demurrer.

Where a general demurrer may be without ſhewing cauſe by the defendant in the concluſion of the plea, *viz. et hoc petit, &c.* or *de hoc ponit, &c.* - - 162
Where there is a demurrer upon evidence, the jury ought to be diſcharged without more enquiry, - - 143
A demurrer cannot be waved without the conſent of him who demurred, - 513

Departure in pleading.

What ſhall be ſaid to be ſo, 76, 77. 228, 229. 246. 257

Deputy.

Deputy is allowable in miniſterial offices, 557
If he miſdemean himſelf, it is a forfeiture, 557
Who ought to approve of the ſufficiency of a deputy, - - - 557

De ſon Tort Demeſne.

Where it ſhall be to the iſſue, - 138
The party himſelf ſhall not take advantage thereby, - - 240. 255

Debt, Debtor, &c.

Whether it lies for waſte, where one is obliged to perform all covenants and payments in an indenture of leaſe, - 76, 77
Debt upon a ſimple contract lies not againſt an executor or adminiſtrator, - 187
It lies not for an attorney againſt him who retained him to proſecute for another, 193, 194
Brought againſt the executors of a ſheriff for money received by their teſtator, upon an execution, - - 539, 540
Upon a leaſe for years, whether it may be brought by the aſſignee of the reverſion in another county than where the land lies, 143. 183
Againſt one as heir to his brother, and it was found that he had the land, as heir to his nephew, - - 151
Upon a contract aſſigned by commiſſion of bankrupts; the debtor dies: if the aſſignee ſhall have the debt againſt the executors of the debtor or not, - 189
Debt upon an obligation good, although he declares *per ſcriptum obligatorium*, 209
Upon a penal ſtatute, - 256, 257
Debt in the common pleas or other courts, upon a judgment in the king's bench: if *nul tiel record* be pleaded, how it ſhall be certified, - - 297, 298
Debtee, where he makes one of the debtors his executor: whether the debt be determined, - - 372, 373

Devaſtation.

What ſhall be a *devaſtavit* by an executor, 490, 491. 564
In huſband and wife for the devaſtation of either, - - - 603

Deviſe.

How they ſhall be expounded, 23, 24. 39. 129, 130. 157. 185, 186
Where a deviſe ſhall convey an inheritance by implicit words, - 23. 368, 369. 447
What ſhall be a counter-mand and total revocation of a deviſe, and what not, 23, 24
Deviſe of an houſe *cum pertinentiis*: whether land occupied therewith paſſeth, - 57
Of all his goods and mortgages to his executors, is a good deviſe of the land mortgaged, - - - 37
Of all his lands and tenements: if he hath land in fee and a leaſe for years, what ſhall paſs thereby, - - 292 293
Of land paying ſuch a ſum out of the iſſues and profits thereof, how it ſhall be expounded, - - - 158
Of land to one ſon and his heirs, and of other land to another ſon and his heirs; and if any of them die without iſſue, the other ſhall be his heir, whether it be an eſtate tail, and how to be expounded, 185, 186
Deviſe to his brother and his heirs; and for default of ſuch heirs to the ſiſter and her heirs: whether it be a good remainder, 57
Deviſe to three and their heirs, and to every of them part and part alike: they are tenants in common, and not jointenants 75
To his ſon and heir of his land, upon condition he ſhall pay his debts: whether it ſhall be aſſets by deſcent, - - 161
To *John* his ſon and his heirs of his body in fee; and if he die in the life of *Alice* his wife, that then *William* his ſecond ſon ſhall be heir to *John*. Afterward *John* dies, having iſſue a ſon in the life of *Alice*: whether *William* ſhall have it in the life of the ſon of *John*, - - 158
To his wife for life, and that afterwards his executors ſhall ſell and diſtribute the money

money to ſuch, &c.: whether they have any intereſt in the land, or but an authority only, and whether the ſurvivor may ſell it, - - - - 382
To his executor for life, and that he ſhall ſell the ſaid land, if there be not aſſets to pay his debts; he ſells by deed inrolled: whether the ſaid ſale be good, 335, 336
Deviſe of his lands in leaſe to his executor for life, the remainder over; there ought to be a ſpecial aſſent thereto by the executor, as to a legacy, or elſe it is not executed, - - - 293
Deviſe of his lands in *A.* and *B.* to ſeveral perſons and their heirs, and all the reſt of his goods, leaſes, eſtate, mortgages, &c. whereof he was poſſeſſed, to his wife, whom he made executrix; an eſtate only for life paſſed, - - 447. 449, 450
Of an houſe called THE WHITE SWAN, where *Nicholls* inhabits, whereas he hath but three rooms therein: whether the entire houſe paſſeth, - 130, 131
Of his corner houſe in the tenure of *J. S.* and *J. N.* and the ſaid houſe is in the tenure of *J. S.* and *J. D.* and his houſe adjoining is in the tenure of *J. N.*: whether and what ſhall paſs, - 447, 448. 473
Deviſe of a term, with divers remainders over, to make a perpetuity; whether good, - - - 230
See tit. Teſtament.

Diminution of Records.

Where, how, and of what things it ſhall be allowed, being certified upon a writ of error, - - - 90
At what time it ought to be alledged, 90
Whether it may be of a writ original, when a writ is before certified, 90, 91. 272

Deſcent.

Of a reverſion expectant upon an eſtate for life, how it ſhall be conſtrued in caſe of cuſtom, - - 411, 412
See tit. Fines.

Diſcharge.

Where it may be good by parole in an *aſſumpſit*, without ſhewing how, 383, 384
Where a priſoner may be diſcharged by parole, - - - - 447
Whether foreſt lands in the hand of a purchaſer be diſcharged from payment of tithes, - - - 94
See tit. Releaſe.

Diſcontinuance of Suits.

What ſhall be ſaid to be a diſcontinuance of proceſs, - - 235, 236
Where it may be pleaded to part, and not to all, - - - - 313
Whether it ſhall be a diſcontinuance of a plea, where day is not given to one of the defendants after verdict; where the court will adviſe till another Term, 236
Whether after verdict it be aided by any ſtatute, - - - 235, 236

Diſcontinuance in Lands.

Where an act may be a diſcontinuance now, and not be a diſcontinuance by matter *ex poſt facto*, - - - 406
Whether it ſhall be a diſcontinuance of the poſſeſſion, where huſband and wife, tenants to them and the heirs of the body of the huſband, remainder over, makes a feoffment, and afterwards levies a fine to the ſame feoffees, and the huſband dies without iſſue, and the wife ſurvives, 320, 321
Whether it ſhall be a diſcontinuance of the reverſion, where tenant in tail and he in reverſion in fee join in a leaſe for life, 385. 405, 406

Diſpenſation.

Whether a diſpenſation to take a ſecond benefice may be upon condition, and by what words, - - 475, 476
To take a ſecond benefice *modò non ſit extra* twenty miles, how to be expounded, 475, 476

Diſſeiſor and Diſſeiſin.

Who ſhall be diſſeiſor and tenant, where the leſſee at will makes a leaſe for years, rendering rent, and the leſſee for years enters and pays the rent, - 303, 304
Whether it be a diſſeiſin, where leaſe for life is made with letter of attorney to make livery, HABENDUM *à die datus* of the livery, - - - 388, 389
Diſſeiſin of a rent ſeck, for refuſing to pay it, being demanded, at the place where it is iſſuing, - - 508
Tenant in remainder diſſeiſed, not knowing thereof, levies a fine to a ſtranger: whether it ſhall bar his right, and enure to the benefit of the diſſeiſor, 284. 303. 305

Diſtreſs.

Where a diſtreſs may be maintained by one who claims by a conuſor by fine or other record, without a *ſcire facias*, - 598
Diſtreſſes for *valor maritagii*, relief, or for amercement in leet; whether maintainable, - - - 533, 534

Divorce.

What be abſolute, and what temporary, 462, 463
Propter ſævitiam, 16. 461, 462, 463

Double Plea.

Where it ſhall be, if he confeſs and avoid and traverſe, and how it ought to be ſpecially alledged upon demurrer, - 61

Dower.

Of what things it is demandable, 300, 301
Demanded againſt equity and the huſband's agreement, at the time of the purchaſe (that inſtantly he ſhould reconvey it); whether it ſhall be recovered in a court of equity, - - 190, 191
Nunques accouple que dower pleaded, 351, 352

E.

Ejectment.

Of what things it lies, - - 555
Whether it lies for tythes, - 301
Whether it lies for him who hath only *primam tonſuram* in land, - 362
Of an hundred acres of bog in *Ireland*, 512
Of a piſcary, - - 492
De uno repoſitorio, - 554, 555
What ſpecial plea is allowable therein, 404

Election.

Where it is at the election of the party injured to have ſeveral actions, 242, 243, 303. 539, 540

Elegit.

Whether the bailiff of a liberty, who hath return of writs, may make an extent upon an *elegit*, and deliver the moiety, 319
Where the writ recited the judgment, & *quod elegit executionem* of the goods and moiety of the land; and in the precept to the ſheriff the words *medietatem terrarum et tenementorum* were omitted: whether it might be amended, - 162, 163

Emblements, 515.

Encloſure, 432, 433.

Endictment.

Where a perſon endicted is not convicted or acquitted, he may be arraigned upon a new endictment, - - 147
Where the perſon endicted ſhews any exception in law, any one not aſſigned may be of counſel for him, - 147
Whether void by the outlawry of one of the jurors, - 134. 147
Where it ſhall be avoided for falſe Latin or want of form, - 464, 465
It cannot be found but by jurors of the county, although it be in a corporation whoſe liberty extends into two counties, 379
Endictment for nuiſances ought not to be quaſhed without a certificate that the nuiſances be avoided or removed, 584
Endictment for perjury ought to ſhew the cauſe of the perjury: but otherwiſe in an action for words concerning perjury, 322
Endictment of treſpaſs before juſtices of peace, and traverſed; whether it may be tried the ſame day or ſeſſions, 315. 340. 438, 439. 448, 449
Endictment of forcible entry, upon ſtatute of 8. *Hen.* 6. c. 9. *in tythes*, 201
Of a common barrator, *contra formam diverſorum ſtatutorum*, - 340
For perjury, - - 352. 553
For engroſſing a great quantity of hay, and ſhews not what quantity, *viz.* loads or truſſes, &c. is void for the uncertainty, 380, 381
Endictment of ſeven-and-twenty perſons for engroſſing and ſelling together, 380, 381
Endictment for ſcandalous ſpeeches of a juſtice of the common pleas, - 503
Upon the ſtatute of *Weſtminſter* 2. c. 46. for throwing down incloſures of improvements, and the proceedings thereupon, 280, 281. 439. 440
Upon the ſtatute of 1. *Jac.* 1. c. 11. for taking a ſecond huſband, the firſt living, 461, 462, 463
Upon the ſtatute of 4. & 5. *Phil. & Mary*, c. 8. for taking a maid againſt her will, 465
Upon the ſtatute of 3. *Hen.* 7 c. 2. for taking a woman againſt her will and marrying her, 482, 483. 485. 489. 493
Endictment of battery for abuſing an infant under ten years in lying with her, 332
Endictment for robbing a chamber in an inn of court; and whether it may be ſaid to be *domus manſionalis* of him who is robbed, 473, 474
For burning of his own houſe *eâ intentione ad comburendum ædes alienas*, 376, 377
Of an anabaptiſt, upon the ſtatute of 35. *Eliz.* c. 1. ſ. 10. - - 591
Endictment for recuſancy, 10. 504

Enfant.

What contracts, covenants, obligations, or other acts ſhall bind him, 179. 502
Whether he may be grantee of an office after an eſtate for life, *exercendum per ſe vel ſufficientem deputatum*, 279. 556, 557
Whether he ſhall avoid by error a recovery againſt his guardian, the judgment being by default of the vouchee, 307
Enfant executor takes the principal money upon a bond forfeited, and makes a releaſe; whether it be good, 490
Enfant, leſſee for years, takes another leaſe for the ſame term and the ſame rent, and with the ſame conditions, &c. 502
Whether he ſhall be admitted to ſue by guardian or by *prochein amie*, 86. 161

Ought not to be amerced, - 410
What office he is capable of, &c. 556, 557

Enquiſition and Enqueſts.

For preſerving encloſed grounds upon the ſtatute of *Weſtminſter* 2. 280, 281. 439, 440

Enquiry of Damages.

Whether it ought to be by the jury after demurrer upon evidence, or by writ after judgment, - - 143

Equity.

Whether an aſſignee in truſt be chargeable with the receipt of his companion, 312
Whether dower demanded againſt equity and the huſband's agreement ſhall be recovered in a court of equity, 190, 191

Error.

Whether it may be aſſigned againſt the record, - - - 53
Whether aſſigned againſt the record it be inſufficient, although a demurrer be thereupon, - - - 53
Not to be aſſigned where it is for the eaſe or advantage of the party who would aſſign it, - - - 437
Becauſe the judgment was *ideo in miſericordiâ* or *ideo capiatur*, where it ought not to be; and where it is in other manner than it ought to be, - - 32, 340
Where the verdict finds damages abſolutely, upon part whereof is a demurrer, where it ought to have been generally and conditionally given upon the iſſue found; ſo merely croſs, it is not amendable, 32, 33
Whether error may be brought in the exchequer chamber of a judgment in the king's bench, in an action of *ſcandalum magnatum*, - - 142, 143
Error, for that the court being created by patent, the proceſs was awarded *ſecundum conſuetudinem villæ*, - 143
Error brought to reverſe a judgment for prepoſterous and too prolix pleading, 164
Whether error lies where judgment is entered againſt one defendant in treſpaſs, and a *nolle proſequi* was entered before againſt the other defendant, 239
Error for giving day till the next court, without mentioning a day certain, 254
Error for omiſſion of a *capias* upon an indictment of recuſancy, reverſed for that cauſe, - - - 505
Error, becauſe the trial is by ſix jurors only, although it were alledged to be *ſecundum conſuetudinem*, - 259, 260
Error where there were proceedings in an inferior court after an *habeas corpus cum cauſâ* delivered and allowed, how it ſhall be tried, - - - 262
Error of a judgment in an inferior court, becauſe the pleint differed from the ſtyle of the court, - - 572
Error of a judgment in battery againſt huſband and wife, where the huſband pleaded generally *not guilty*; and *quoad* the wounding the huſband and wife pleaded *not guilty*, and *quoad* the battery the wife pleaded juſtification with an averment, *et hoc parata eſt, &c.* - - 594
Error of a judgment in the exchequer-chamber, where it lies and where not, 286. 300
Error in the exchequer-chamber upon a judgment in a *ſcire facias* to have execution upon a judgment in the king's bench, 246. 464
Whether error lies for the principal and bail for an error *tum in judicio quàm in executione*, 300. 408. 481. 574, 575
Brought by the principal and bail for an error in the principal judgment and execution againſt the bail, and therefore abated, 574, 575.
If it lies for the bail for an error in the principal judgment and in the execution, or for the execution only, 481. 561
Brought by the bail for a judgment given againſt the principal. - 561
Where an infant ſuffers a recovery by his guardian, the judgment being by default of the vouchee, - - 307
Where judgment is given for all, where the tenant pleads but to part in a writ of right, and iſſue taken and tried thereupon, 310, 311
Whether it lies for the king upon an indictment of recuſancy, - - 505
Error to reverſe a fine acknowledged, 415, 416
Error, becauſe more jurors than twelve were in a writ of enquiry of waſte, 414
Error where writ is awarded to the coroners, where the ſheriff is plaintiff or defendant, 345, 346
Where three executors ſue, and the one is ſevered, and judgment given for the two who proſecute, whether it be error, 420, 421
Error brought againſt three executors where one appeared and confeſſed the action and judgment, *quòd recuperet debitum* againſt the three, and execution *de bonis teſtatoris, ſi tantum*, and damages *de bonis propriis* of him who appeared, and *miſericordia* againſt all, - - 564
Where the *venire facias* is againſt two defendants and the iſſue tried, whereas the one was dead before the *venire facias* awarded, whether it be error, 426
Where juſtices of peace proceed to trial upon an indictment of treſpaſs the ſame day that it is found and traverſed, it is erroneous, 340. 438. 448, 449
Error of a judgment in an inferior court, becauſe it was *ideo conceſſum eſt*, where it ſhould have been *ideo conſideratum eſt*, &c. 442, 443

Whether it be error in a judgment of waſte, where it was aſſigned in cutting down twenty apple-trees, and the jury find the waſte in cutting down two apple-trees, and no judgment of *ideo in miſericordiâ pro reſiduo*, - - 453
Error of a judgment in the common bench; if it may be reverſed in part and affirmed in part, - - - 471
Error brought here of a judgment given in *Ireland*, and reverſed; how the proceedings ſhall be thereupon, 511, 512
Error lies not where judgment is entered againſt the defendant by default, 517
Error, becauſe the judgment was *quòd querens nil capiat per breve*, where it ſhould be *nil capiat per billam*, - 580
Error in part of an order cannot vitiate the whole order, - - 471

Eſcape.

Where it ſhall be where a priſoner goes at large with his keeper by colour of an *habeas corpus*, - - 14. 466
Whether the eſcape of one in execution be cauſe of diſcharge of the other debtor, 74
Eſcape and breach of priſon, the difference, 110

Eſſoign.

How and when to be made by the judges, 13, 14. 206
Ought not to be caſt for the defendants or tenants, where they appear by attorney, 511
After once default and reſummons, an eſſoign is not allowable, - 341

Eſtate.

There cannot be a fraction of eſtates in deeds, - - 548
Eſtate contingent; by what act it ſhall be deſtroyed, - 102, 103. 364. 529
Where an eſtate of inheritance ſhall be created by deviſe, - - 230. 447
Eſtate limited to huſband and wife in the *habendum* to the uſe of them and the heirs of their bodies; whether it be an eſtate tail, - - - 230. 245
Eſtate for life limited by expreſs limitation, ſhall not be an higher eſtate by implication, 367
Eſtate upon ſurrender of a copyhold to the uſe of one for life; and for want of iſſue of his body, to the uſe of another and his heirs: what eſtate the firſt hath, whether for life only or not, - - 367

Eſtoppel.

Leaſe by indenture ſhall eſtop the party in pleading; but the truth being found by the verdict, the court ought to adjudge according to the truth, - 110
Where an eſtoppel may be againſt an eſtoppel, 478

Eſtranger.

Whether a party named in a deed that doth not ſeal it, ſhall be counted a ſtranger unto it; and when he ſhall take advantage thereof, - - 289

Exception.

Whether it may be after the limitation of an eſtate, - - - 437

Exchequer. *See* Court.

Excommunicato Capiendo.

How it ought to be made, 197. 199. 583
Whether it ſhall be good, not being for any of the five cauſes mentioned in the ſtatute of 5. *Eliz.* - 197. 199
Whether, being at the ſuit of the party, he ſhall be diſcharged by a general pardon in parliament, he not being excepted therein, 199

Execution.

Execution without ſatisfaction is no bar, 75
Taken againſt one is no bar, but that he may ſue the other, - - 75
One taken in execution in *London*, and removed by *habeas corpus* into the king's bench, ſhall be committed there in execution for that debt, and having diſcharged all cauſes in the king's bench, ſhall be remanded, - - - 128
Whether it ſhall be awarded where the party, formerly taken, reſcued himſelf and eſcaped, - 75. 109. 203. 240. 255
It cannot be of a judgment in an inferior court by *certiorari* and *mittimus* thereupon, - - - 34
What execution ſhall be taken forth againſt him, who, hanging the ſuit, is made a peer of the realm, - 205, 206
Execution upon a record of attainder of a felon removed out of another court, 176
Upon a *ſcire facias* by the huſband, upon a judgment in debt brought by him and his wife as adminiſtratrix, - 464

Executor.

Who may be an executor, - 9
Whether upon a nonſuit he ſhall pay coſts, 29
Whether he ſhall be charged in the *debet* and *detinet* in debt for rent, upon a leaſe for years made to the teſtator, arrear after his death, - - 225
Whether he may diſtrain for a rent-charge granted by the teſtator for divers years, the years being determined, 471
Whether an executor or adminiſtrator ſhall be inforced to find bail upon the ſtatute of 3. *Jac.* in a writ of error, or ſhall have a *ſuperſedeas* without bail, - 59

Where an executor ſuffers a judgment in debt for a debt of the teſtator, and dies inteſtate; whether a *ſcire facias* lies upon this judgment againſt the adminiſtrator of the firſt man, - - 167
Whether judgment ſhall be againſt an executor for the entire debt, where it is found that he hath aſſets but for part of the debt, 167
Whether an executor ſhall be charged in debt by a contract aſſigned by the commiſſioners of bankrupts, - 187
Where an executor or adminiſtrator ſhall be ſaid to be aſſignee, - 289
How the authority of executors may be divided, - - 293. 420
What ſhall be ſaid to be an aſſent of an executor unto a legacy, - 293
Whether he ſhall have an action againſt a ſheriff for not returning a writ, and for what wrongs done *in vitâ teſtatoris*, 297
Where an executor ſhall be charged *de bonis propriis*, 518, 519. 526, 527. 565
Whether he may plead a ſtatute for the payment of money at a day to come againſt a debt upon an obligation, - 363
Whether the executor of an obligee, being alſo executor to one of the obligors, may have debt againſt the ſurviving obligor, 372, 373
Whether an executor, accepting the principal debt upon a bond forfeited, and making a releaſe, it ſhall be a *devaſtavit* for the reſidue, - - 490
Whether executors ſhall have the next avoidance of a benefice granted unto their teſtator for life only, - 505, 506
Executor *de ſon tort*; whether chargeable where an adminiſtrator hath fully adminiſtered the teſtator's goods, 88, 89

Expoſition.

Of ſtatutes, how to be made, 34. 83, 84, 85, 533
Of deeds, - - 173. 548
Of words, - 212. 393
Of the words "*cum pertinentiis*," 17, 18. 57. 109. 482
Firmum facere, - - 202
Provided, - - 128, 129
Si modo, - - 475, 476
Terdecem annos, - - 386
Quinginta for *Quinquaginta* - 259
Solvendo, - - 289
Catalla, - - 293
Repoſitorium, - - 555
Cum ſerâ appenſâ, - - 562

Extent.

How goods extended before the *liberate* are bound thereby, - - 149
How to be made by the bailiff of a liberty upon an *elegit*, - - 319
Whether it may be awarded for a common perſon againſt one who is in execution for debt to the king, - 389, 390
Upon a ſtatute ſtaple; whether it may be by the ſheriff when the party dies, after the *teſte* of the writ and the inquiſition taken, 451, 452. 457, 458, 459

Extinguiſhment.

Where it ſhall be of a way by unity of poſſeſſion, - - 418, 419
Parſon, patron, and ordinary, before 13. *Eliz.* made a leaſe for ninety-nine years (there being a former grant of the next avoidance); the parſon dies; the grantee preſents an incumbent, who avoided the leaſe; it is thereby totally extinguiſhed as to his ſucceſſor, - - 582

Extortion, 438. 448, 449.

F.

Falſe Impriſonment.

Where one is arreſted upon a *capias* and the writ not returned at the day, 446, 447

Fees.

What fees ſheriffs ſhall take for ſerving executions, - - 286, 287

Felony.

Whether the burning of a man's own houſe maliciouſly to burn the houſes adjoining be felony, - 376, 377, 378
Whether it be felony in a ſoldier to depart from his conductor without licence, 71
Where felony committed in one county may be tried in another adjoining county, and where not, - 247, 248
Whether it be felony in a woman divorced to take a ſecond huſband, the firſt living, 461, 462, 463
Where one attempts to break open a houſe with an intent to commit burglary or to kill any therein, and a ſtranger within the houſe kills him, it is no felony, 544

Feme.

What ſhall be ſaid to be forcible taking a maid againſt her will, - 488, 489
Feme ſole recovers in an action, and before day *in banco* takes *baron*, ſhall have her judgment, - - 232
Feme ſole merchant, how to be ſued, 68, 69
Feme covert, where ſhe ſhall be prejudiced in her inheritance by her huſband's act, 7

Whether,

Whether, if ſued with her *baron*, ſhe may appear, to avoid impriſonment, &c. 58, 59
Cannot be charged with her huſband for converſion of goods to the uſe of them, 254. 494, 495. 519
What goods a *feme covert* may have, 519. 554
Feme obligee takes one of the obligors to huſband, it is a diſcharge for all the obligors, - - - 551
Join with her huſband in a letter of attorney to deliver a leaſe, - 165
To what intents ſhe may make a will, and where the huſband is tied to perform it, 219, 220. 376. 597
Feme divorced takes a ſecond huſband, the firſt living; whether it be felony, 461, 462, 463
See tit. *Baron & Feme*.

Fieri Facias.

Huſband and wife executrix ſued in debt, and upon judgment and *fieri facias*, *nulla bona* being returned, the plaintiff procured a new *fieri facias*, & *quòd ſcire facias* to the defendants to be in court ſuch a day, who then appeared and demurred upon the writ; which being adjudged good, and that they ſhould anſwer, they imparling, judgment was given by *nihil dicit*, that the plaintiff ſhould have execution *de bonis propriis*, 518, 519. 526, 527, 528

Fines of Lands, 524, 525.

What ſhall bar the heir in tail, 434, 435. 543
Fine and nonclaim, what actions it bars, and who may take advantage thereof that hath nothing in the land, 110. 156. 200, 201. 576, 577
Fine with proclamations, at what time and by whom they ſhall be avoided, 156, 157. 200
With proclamations and five years paſſed, whom it ſhall bar, - 576, 577
With proclamation to the heir, who enters during the nonage of the deviſee, and nonclaim within five years; whether it ſhall bind the deviſee - 200, 201
Levied by *J. S.* uncle of *A.* an ideot, who was ſeiſed of the inheritance (the ſaid *J. S.* dying in the life of *A.*) ſhall not bar the grandchild of the ſaid *J. S.* 524
Fine levied by the diſſeiſee to a ſtranger, where it ſhall enure to the benefit of the diſſeiſor, - 303. 305. 483, 484
Levied by a diſſeiſee to a ſtranger not knowing of the diſſeiſin; how it ſhall enure, 484
Levied by the eldeſt ſon, heir in tail, who dies without iſſue in the life of his father, tenant in tail; whether his younger brother ſhall be barred by this fine, 434, 435
Levied by him who occupies in truſt and hath the inheritance and non-claim; whether it ſhall bar his leaſe for years, 110
Whether it may be levied of a place known without mentioning of any vill or hamlet; where it lies, - 219. 269. 276
Quòd partes finis nihil habuerunt, 514. 524

Fines aſſeſſed in Courts.

Aſſeſſed by judgment openly in court, cannot be qualified - - 251
How they ſhall be aſſeſſed in judgments upon informations - 251
Aſſeſſed for treſpaſs in a foreſt, may be levied by proceſs in the king's bench, 409, 410
Aſſeſſed by the high commiſſioners, how to be levied, - - 113, 114.
Impoſed upon an attorney for proſecuting actions without ſuing original writs, 74
Impoſed upon an attorney for falſifying and forging a writ of *capias*, - 74
Impoſed upon a clerk for entering and certifying a too prolix record in abuſe of the ſubjects, - - 164
For amending a record before and without direction of the court, - 278
For a miſpriſion in a record, - 278
Fine not impoſed, *quia pauper*, 74

First-Fruits and Tenths.

The books of the valuation of them, when compoſed - - 456

Foldcourſe.

Whether a foldcourſe may be divided, 432

Forcible Entry.

Indictment upon the ſtatute of 8. *Hen.* 6. of forcible entry in tythes, - 201
Whoſoever is owner of the ſoil may enter lawfully and detain with force againſt any who pretends to have common there, 488, 489

Forfeiture.

What ſhall be forfeiture of a jointure within the ſtatute of 11. *Hen.* 7. - 244
By the huſband of his copyhold in right of his wife; where it ſhall bind the wife and her heirs after the huſband's death, 7
Whether a copyhold may be forfeited by making a leaſe thereof for one year without the lord's licence or ſpecial cuſtom, 233, 234
Whether it may be forfeited for not paying the ſet fine - - 196

Foreſt.

Where the juſtices ſeats are to be held in foreſts, - - 409, 410
How fines, in juſtices ſeats in foreſts aſſeſſed, may be levied, - 409, 410
Whether foreſt lands purchaſed from the king, which were exempted from payment

of tythes, ſhall be diſcharged in the hands of the purchaſors, - - 94

Franchiſes and Liberties.

How they may be deſtroyed or determined in parks, - - 59, 60
Where they ſhall be ſeized for abuſing them, 253

Franktenement.

Where it may be granted by copy, 200
Whether he ſhall be ſaid to have a franktenement who hath *primam tonſuram* only in a meadow, - - 362

Fraud. *See* Colluſion.

G.

Gavelkind Land.

Its properties and cuſtoms, 584. 561, 562

Grants.

Grants of land and common; whether it ſhall be intended to be in groſs or appurtenant, - - 300, 301
Of a rent; whether it ſhall be by the word *reddendum & ſolvendum* in an indenture of leaſe, - - 288, 289
There cannot be a grant of an inheritance *in futuro*, - - - 448. 547
Of a term, *habendum* after the death of the grantor; it is an immediate grant and a void *habendum*, - - 155
Of the next avoidance of a church unto one during his life; whether his executors after his death ſhall have it, 505, 506
None may entitle himſelf to any copyhold, but he muſt ſhew a grant thereof, 190
The addition of a falſity in a deed or grant ſhall never prejudice where there was any certainty before, - - 548

See tit. Deeds.

Grants of the King.

Where it ſhall be void for non-recital or miſ-recital of a former grant thereof, and where a *non-obſtante* ſhall help it, 198. 548
Where an office is found for the king by commiſſion under the great ſeal; where the king's grant ſhall be good, and where not, - - 172, 173
Of a meſſuage and land appertaining thereto; how it ſhall be conſtrued, and what lands in the king's caſe ſhall be ſaid to be appertaining - - 21, 22
Where there is a falſity in point of prejudice to the king's benefit or a miſinformation of the king's title, or upon a falſe ſuggeſtion, there all grants made by the king ſhall be void, - - 548

H.

Habeas Corpus.

In an *habeas corpus* the return of the cauſe of the commitment of the priſoner ought to be certain, 133. 558, 559. 593
If no cauſe of commitment be returned in the *habeas corpus*, the priſoner ſhall be diſcharged by bail, &c. 507. 552
Habeas corpus and *certiorari* to remove a priſoner attainted for felony in another county, and judgment to have execution given in the king's bench, - - 176
To remove a priſoner in execution; how and in what manner he ought to be uſed, and where it ſhall be an eſcape under colour thereof - - 466
For a priſoner committed by the lords of the council, and returned thereupon, 133. 168. 579
To remove a cauſe, and the proceedings thereupon, out of an inferior court, 262
Upon *habeas corpus*, priſoners diſcharged without bail, - - 569, 570
Habeas corpus by one who was committed by order of the exchequer for not paying a fine impoſed upon him by the eccleſiaſtical commiſſioners, 579. 582

Habendum.

Where repugnant to the grant, how to be conſtrued, - - 155. 400
To one, to the uſe of another and his heirs, whether this limitation of the uſe gives more than the eſtate for life, 230. 245

Habere facias Poſſeſſionem.

How to be awarded into *Ireland*, 512

Hariots.

Whether he who demands an hariot, and demands thereupon, ought to ſhew the kind of beaſt, and the price thereof, 260

Heir.

The words in a will which diſinherit an heir ought to have an apparent intent, 369. 450
How the heir ſhall be charged, where he denies the deed to be his father's, 336, 337
How he ſhall be charged in a *ſcire facias* upon a recognizance of his father's, 295, 296. 312, 313
Whether he ſhall have the rent, where the leſſee covenants to pay the rent to the leſſor, his heirs, and aſſigns, 307

Upon

Upon a mortgage for the payment of money, performed by the daughter; a ſon is afterwards born; whether the ſon or daughter ſhall have the land, - 87

Honour.

Where an honour conſiſts of ſeveral manors, how the courts of the manors are to be holden, - - 367

Hoſtler and Innkeeper.

May detain the horſes of his gueſts for non-payment of their paſturage; but ſo cannot a private man, - 271, 272
Whether an innholder is within the ſtatute of bankrupts, - - 549, 550

Hue and Cry.

When and how it ſhall bind, - 37
Whether it may be made in the adjoining hundred, - 37. 41. 379. 442

Highway.

Incloſed, an information brought thereupon, 184, 185. 266, 267

I.

Jeofail.

Where it is aided in the king's ſuit, 312. 315
In *a bis petitum* in dower, - 301
Where the recital of the bills is *in placito tranſgreſſionis*, and the declaration is in an action upon the caſe, - 325
Where the declaration is variant from the original writ, - - 327

See more in Statutes.

Implication.

Where it ſhall increaſe an eſtate, and where not, - - - 367

Impriſonment.

Where it ſhall be appointed by the commiſſioners for eccleſiaſtical cauſes, and where not, - - 114
Impriſonment during life is not uſually awarded but where there is an awarding of forfeiture of lands during life, 504
None may ſtay or impriſon any without an officer, unleſs in felony, - 235

See more in Priſon *and* Priſoners.

Inducement.

What certainty an inducement to a plea ought to have, - - 138
Inducement to a traverſe ought always to be ſufficient in matter, - 336

Infant. *See* Enfant.

Information.

Againſt an under-ſheriff for ſeveral crimes and miſdemeanors, - 566, 567
For non-reſidency before juſtices of aſſiſe, 146
Upon a penal ſtatute; where it may be in *London*, or in an inferior court, 112. 146
Againſt the mayor and commonalty of *London*, for ſuffering offenders to eſcape, who had committed murder publicly, 252
For a riot and reſcous, - 251, 252
For incloſing an highway, 266, 267
Where it ſhall be good for the king, where it is ill for the party who informs for the king and himſelf, - 331
Information brought in the king's bench for miſdemeanors - -- 579
Where informations are brought upon a penal ſtatute, where part is given to the king and part to the proſecutor, there it ought to be *qui tam pro domino rege, &c.* otherwiſe it is where the king is only named as an offence againſt him, - 336
Information for the king, the city of *London*, and himſelf, againſt a currier, 588, 589
Informers, how to be ſworn, and to have the moiety, &c. - - 316

Ingroſſing.

What ſhall be ſaid to be ingroſſing and within the ſtatute of 5. *Edw.* 6. 231, 232. 314, 315

Innkeeper. *See* Hoſtler.

Inrollment. *See* Relation, *and* Bargain and Sale.

Inſtitution and Induction, 354, 355, 356, 357.

Under what ſeal it may be, - 342
Trial of inſtitution ſhall be by the biſhops of induction, *per pais*, - 380
Without a preſentation, is void, 99

See more in *Quare Impedit.*

Intendment.

Where it ſhall make a declaration and plea good, 6. 63, 64. 80. 195. 221. 272. 301. 387. 341. 363. 383. 386. 392. 401. 413. 426. 458. 461. 472. 497. 539. 555
Where it ſhall make a ſheriff's return good, 189

It ſhall be taken according to the common parlance, - 192. 226. 510
It ought to be conſtrued according to the rules of law and reaſon, - 413
Intendment ſhall not make a replication good, - - 80. 94
Where the condition of a bond ſhall be made good by intendment, - 226

Joinder in Action.

Where it may be by the king and a common perſon, - - 256, 257
Where it ought to be by *baron* and *feme*, 419. 437, 438
In *audita querela* by three, where one only was taken in execution, 443, 444

Joint-Tenants.

Deviſe of lands to three, part and part like; whether they be joint-tenants or tenants in common - - 75
Action, real, brought againſt joint-tenants or coparceners; the death of one of them ſhall abate the writ, - 574. 583

Jointure.

What ſhall be ſaid to be a jointure within the ſtatute of 11. *Hen.* 7. - 244

Ireland.

How *habere facias poſſeſſionem* ſhall be awarded into *Ireland*, - - 512
Whether a prohibition lies for a thing done there, - - 264

Iſſue joined.

Where it ſhall be found for him who pleads, when it is found in ſubſtance but not in words, - - - 148
Upon payment made 31. *September*, 78
Tried upon an ill and void plea; how it ſhall be good, - 25
Whether it ſhall be an iſſue, and may be well tried when it is in the affirmative without a negative, and the concluſion is, *et de hoc ponit ſe ſuper patriam, et querens ſimiliter*, 80. 316, 317
Quòd ipſi non ſunt culpabiles in an action againſt the huſband for the wrong done by his wife, - - 417
Although the plaintiff joineth iſſue upon a defective plea, yet having a good declaration, and found for him, judgment ought to be given for him, - -

Judgment.

Where judement ſhall be *ideo in miſericordiâ*, and where *ideo capiatur*, 32. 178. 561
Where the defendants are found ſeverally guilty for ſeveral cauſes and ſeveral damages given, judgment that one of them be *in miſericordia*, and that one *miſericordia* be againſt the plaintiff, where the defendants are ſeverally found *not guilty* for part, - - 54, 55
Where the defendant, after imparlance, pleads outlawry, and, upon *nul tiel record* pleaded, fails of the record, judgment ſhall be abſolutely given, and not a *reſpondes ouſter*, - - 566
Huſband and wife ſue in treſpaſs; the huſband dies betwixt the day of *niſi prius* and day *in banco*, no judgment ſhall be entered - - - 509
Judgment againſt huſband and wife executrix, by *nihil dicit*, to have execution *de bonis propriis*, 518, 519. 526, 527, 528
Judgment againſt huſband and wife, *quòd capiantur* in treſpaſs, where the huſband is acquitted, - - 506, 507
Et e contra, - - 513
Judgment againſt an infant, *quòd non ſit in miſericordiâ* - - 410
How it ought to be given in a writ of right, 310, 311
How it ſhall be where ſeveral damages are found againſt ſeveral defendants, 54, 55. 192, 193
Given for the plaintiff, where the iſſue is found for him upon an idle and void plea, 25
Erroneous, becauſe it was *ideo conceſſum eſt*, 442, 443
Againſt an executor, when it ſhall be of the entire, where aſſets is found but for part of the debt, - - 167
Againſt an executor or adminiſtrator for coſts, - - - 219
Againſt an heir, where he pleads a falſe plea which lies not in his conuſance, 436, 437
Judgment reverſed in an *ejectione firmæ*, becauſe the declaration was of a meſſuage and forty acres of land, meadow and paſture, and do not diſtinguiſh how much of every one, - 179. 573
Judgment reverſed, becauſe it appeared by the declaration that the action was brought before there was any cauſe of action, 575
Judgment reverſed in the common pleas, becauſe an attorn y there brought his action by a bill of privilege; and the judgment was, *quòd querens nihil capiat per breve*, where it ſhould have been *per billam*, 580
Judgment reverſed in debt, becauſe the defendant pleads payment of 221. 6s. 8d. and the plaintiff faith, *non ſolvit* the ſaid 51l. 6s. 8d. and ſo there was not any iſſue, - - 593
Where it ſhall be for the plaintiff after verdict for him, although there be no original writ nor bill filed, - 281, 282
Where it may be reverſed for part, and affirmed for part, - 471
Judgment to reverſe a judgment in an inferior court, in a *formedon* given for the defendant; the plaintiff's declaration being ill, how it ſhall be given, 444, 445
How it ſhall be where tenant by receipt makes default. - 263, 264
Judgment againſt an attorney who falſely demeaned himſelf, - - 78

Againſt one who offered himſelf as a ſubſidy-man to be bail, and ſo did ſwear that he was, and afterwards confeſſed it to be falſe, - - 148
Againſt one for publiſhing a libel, 175
Againſt one for ſcandalous ſpeeches uſed to a judge ſitting in court, - 504
Againſt one for ſtriking in WESTMINSTER HALL, *ſedentibus curiis* - 374
Of the pillory and fine for riot in a reſcous, 506, 507
Judgment againſt one for cheating with falſe tokens, - - - 564
Judgment upon an indictment for taking a child under the age of ten years, although the party did not raviſh or carnally know her, - - - 332
Judgment upon an indictment upon the ſtatute 31. *Hen.* 8. c. . for taking a maid inheritrix forcibly, and marrying her, &c. 484. 488. 492
For burning his own houſe in a city voluntarily, to the intent to burn the adjoining houſes, - - - 378
In treaſon, for counterfeiting coin, what it ſhall be, - - 383
In treaſon, upon the ſtatute 25. *Edw.* 3. c. 2. for ſpeaking traitorous words againſt the king, - - 332, 333
Upon every conviction in indictments the judgment ought to be *quòd capiatur*, 505

Judges and Juſtices.

Chief juſtices of the king's bench, how made and amoved, - 52. 65. 225. 403
Removed, and pleads afterwards as a ſerjeant at law, - - 375
Juſtices of the king's bench, their authority, 213. 464
Juſtices of the common pleas made juſtices of the king's bench, and how their ſeniority may be preſerved, 127, 128
Chief juſtice of the common pleas and lord keeper of the great ſeal, both one perſon at one time, - - 600
Chief juſtice of the common pleas diſcharged, and another made, - - 375
Juſtices of both benches made, 1, 2, 3, 4. 211. 225. 268. 339. 375. 403. 567, 568
Chief baron of the exchequer hath his office *quamdiu ſe bene geſſerit*; but the judges of both benches are made *durante bene placito regis*, - - - 203
Chief baron being commanded by the king to forbear the exerciſing of his judicial place in court, would not leave his place, nor ſurrender his patent, without a *ſcire facias*, - - - 203
Judge and officer, who may be, 138
Juſtices of the foreſt, - 409, 410
Juſtices of *oyer* and *terminer*, whether they may try ſoldiers departing from their captain and conductor without licence, 72
Juſtices of *oyer* and *terminer*, whether they may enquire and take traverſe, and determine indictments the ſame day 448
Juſtices of *niſi prius* or aſſiſes, their authority, - - 112. 211
Juſtices of the grand ſeſſions of *Wales*, their authority, - - 342
Juſtices of peace, whether they may be made by patent, - - 223
What acts he may do as juſtice of peace out of the county, - 212, 213
Their power of enquiring about informations, - - 112, 113
Cannot compel any to enter recognizance, or may uſe any coercive power out of the county, - - 213
Whether they may take inqueſts, try, and determine civil offences in one and the ſame day, - 438, 439. 448, 449
May take money to lie *in depoſito* for the ſecurity of the peace, - 446
Their power upon the ſtatute of 5. *Eliz. of Labourers*, - - 213
Ought not to aſſeſs damages themſelves without enquiry by the jury, 448, 449
Their power about making orders in caſe of baſtardy, 213. 341. 350, 351. 470, 471
Their power upon the ſtatute of 15. *Rich.* 2. *of Forcible Entries*, - 486
Whether, at their ſeſſions, they may try ſoldiers running away from their captain or conductor, - - - 72
A warrant from a juſtice of peace to an officer, for the levying of a rate unduly taxed, will not excuſe the officer, &c. 394, 395
How juſtices of peace are to proceed againſt one, who, being elected an officer, refuſeth to be ſworn, - 567
Words actionable of a juſtice of peace, *he is but an half-ear'd juſtice*, 223: *I could never get any juſtice, but injuſtice at his hands*, - - - 14

Jurors.

Whether one outlawed in a perſonal action may be admitted to be a juror, 134
Challenged after he was marked to be ſworn, cannot be withdrawn without conſent, 291
Where, if miſ-named, it ſhall be a miſ-trial, 194
Jurors having lain all night, and not agreeing, one of them by conſent was withdrawn, - - 484
Whether jurors, in a private juriſdiction, have a power to aſſeſs damages for the plaintiff's loſs in another county, 571

Juſtification.

Every one may juſtify the apprehending of a common cheater with falſe dice, to carry him before a juſtice of peace, 235
None can juſtify the cutting of another's net who fiſheth in his piſcary, but he muſt take them *damage feſant* - 226

Where, in treſpaſs of aſſault and battery, the defendant juſtifies at another day and place, - 514, 515. 572, 573

K.

King.

Whether the king may enter into warranty as vouchee by the attorney general; and how a remainder in tail in him may be barred by barring the remainder over, 96, 97

Where the king may take advantage of a condition broken without office, and where not, - 99, 100. 172, 173

Where the king and a common perſon may join in action, - 256, 257. 336

The king may wave a demurrer or iſſue, but not any other perſon without the attorney general conſents, - - 347

The king may preſent to any church which he hath in right of wardſhip, either under the great ſeal, or under the ſeal of the court of wards, - 99, 109

May try his iſſue at the bar or by *niſi prius*, at his pleaſure, - - 247

The king ſhall never render in value upon voucher, - - 97

A common perſon ſhall not have execution againſt the king's debtor until agreement for the king's debt, - 390

The omiſſion of a clerk ſhall not prejudice the king, - - - 349

Whether error lies for the king upon an indictment of recuſancy, - 504

Whether a ſucceſſor king may take advantage of a lapſe incurred in the time of his predeceſſor, - - 335, 336

Where a freehold may paſs from the king without a patent under the great ſeal, 513

Where title appears for the king, the court, *ex officio*, ought to award for him, 590, 591, 592

L.

Lapſe.

Where it ſhall incur, - - 357

See more in *Quare Impedit.*

Leaſes.

Leſſee for years aſſigns over his leaſe in truſt for himſelf, and after purchaſeth the inheritance and occupies the land, and levies a fine with proclamations; whether this intereſt be barred, the truſtee claiming his leaſe within five years,

Where one covenants and grants that J. S. ſhall enjoy ſuch lands for ſix years, J. S. covenants to pay annually ſuch a rent unto him; whether this be a leaſe for years, - - -

Leaſe for years by indenture by him who hath nothing therein; whether it be binding, being found by verdict,

Whether a leaſe for years may be deviſed to one and the heirs of his body, with remainders over, and ſhall be good by way of limitation, - - -

Leaſe HABENDUM *à die datûs indenturæ* for life, with letter of attorney to make livery after the day, and livery is made accordingly; whether it be a good leaſe,

If the leſſor fell the trees, living the tenant for life, and the tenant for life cut them down, whether the vendee ſhall have *trover and converſion*, -

Whether the leſſor may have *trover and converſion*, when a ſtranger, during the leaſe for years, cuts down and carries away timber trees, - 242, 243.

Leſſee for years aſſigns over his term, and the leſſor accepts of the aſſignment; the leſſor notwithſtanding may ſtill maintain his action of covenant againſt the leſſee for a condition broken by the aſſignee, 187. 589

Leſſee for years, upon condition that he ſhall not alien any part above three years during the term, and if he do, that the leaſe ſhould be void; who lets for three years, and ſo from three years to three years, during the term of his life; whether this be a breach of the condition, 511, 512

Leaſe for years, upon condition that he ſhall not alien above three years during the term, *ut ſupra*; who lets *ut ſupra*; the leſſor accepts the rent of the aſſignee at a day after: whether this acceptance makes the leaſe good, &c. - 511, 512

Leaſe for years to begin after a former leaſe determined, which is miſ-recited; *quære*, when the laſt leaſe ſhall commence, 398, 399, 400

Leaſe for years by deed is raſed in a material part by the leſſee after the delivery; whether the intereſt and term be determined and void as well as the deed, 399

Leaſe by a biſhop by indenture, reſerving the ancient rent (but mentions not any rent certain, nor lets not all the manor together, which was uſually demiſed under one rent), is a void reſervation, and a void leaſe againſt the ſucceſſor, - 95

What ſhall be a good leaſe within the ſtatutes of 32. *Hen.* 8. c. . and 13. *Eliz*, c. . 22, 23

Leaſe made by parſon, patron, and ordinary, being avoided by the next incumbent, diſcharges all his ſucceſſors, 84, 85

Leaſe for years by huſband and wife of the lands of the wife; whether void or voidable, - - - - 22. 185
By huſband and wife, of the lands of the wife, HABENDUM from *Michaelmas* for life, and livery is made after *Michaelmas*; whether it be good, - - 171
Leaſe for one-and-twenty years, rendering the ancient rent, by the huſband only, of the lands whereof he is joint-tenant with his wife in fee; whether it ſhall bind the wife, - - - - 22, 23
Leaſe for years by huſband ſeiſed in right of his wife, or by tenant by the courteſy, is void by his death, and not voidable, 398, 399

Leet.

Where it may be within another leet, and the difference betwixt a leet and a tourn, 75, 76
Whether for amerciament in leets and court barons upon a diſtreſs, damages and coſts ought to be given to the avowant, 533, 534, 535

Letter of Attorney.

By huſband and wife, to deliver a leaſe upon the land; whether it is void or voidable only by the wife, - - 185

See more in Leaſes *and* Livery and Seiſin.

Libels, 175.

Liberate.

Whether it may be by an adminiſtrator upon an extent ſued by the executor, 451, 452
Whether the ſale of the goods of a bankrupt by the commiſſioners to another of them be good after *liberate*, - 149, 150

See tit. *Exeunt.*

Licence.

To incloſe an highway, when and how it ought to be obtained, - 266, 267

Limitation of Eſtates.

What ſhall be ſaid to be limitation of an eſtate, and what a condition, 230, 231. 367. 577
Limitation of an eſtate upon a poſſibility after a poſſibility, is void, - 577

Limitation of Actions, 115.

See more in Statutes.

Livery and Seiſin.

By an attorney upon a leaſe for life *à die datûs*, made the ſame day of the date, is a void leaſe and livery, 94, 95. 388, 389

London.

Where a cuſtom there may be pleaded againſt a ſtatute, - 347. 361
How the cuſtoms there are to be certified into other courts, - 516, 517
One taken in execution in *London*, and removed by *habeas corpus* into the king's bench, ſhall be committed there in execution for that debt, and having diſcharged all cauſes in the king's bench, ſhall be remanded, - - 128
Cuſtom for a *feme covert* merchant there, 68, 69
Cuſtom that one being apprentice and made freeman may uſe any trade, 347. 361. 516, 517
Cuſtom that every citizen and freeman of *London* may deviſe his lands in mortmain, 248, 576
Cuſtom that the wife ſhall have the moiety of the goods whereof her huſband died poſſeſſed, - - 344, 345
An action may be maintainable in *London*, which is not actionable in the courts at *Weſtminſter*, - - 350. 387
Where and how wills of lands in *London* are to be proved, - - 396
Aldermen of *London*, their privileges, 585
Why the archbiſhop of *Canterbury* never makes any viſitation in *London* dioceſe, 340
Act of parliament for the relief of poor citizens and freemen of *London*, being ſued there under forty ſhillings, - 572
Cuſtom for the payment of tythes for houſes in *London*, and where the ſuit ſhall be, 596

M.

Maintenance.

Whether it be maintenance for an attorney to ſolicit another's buſineſs in another court than where he is attorney, 107. 160
Information upon the ſtature of maintenance, 232, 233

Manor.

What it is, and what ſhall be reputed parcel thereof, and what time is ſufficient to gain a reputation, - - - 308

Marriage.

If a woman be violently taken away and married, although ſhe aſſents thereto by force, it is a marriage within the ſtatute of 3. *Hen.* 7. - - - 488
Whether a woman divorced from her huſband, and marrying a ſecond in his life, be a felon, &c. - 461, 462, 463
Fine to the king for inveigling one, being drunk, to marry in the night, &c. 557

Marſhal of the King's Bench.

The office thereof not grantable for years, 587

The priſon of the king's bench is not any local priſon confined to one place, 210. 466

Meſſuage.

What land paſſeth by the grant of a meſſuage *cum pertinentiis*, - 17

Miſnomer.

Of a corporation, where it ſhall make the deed void, - - 160

Of a juror in his chriſtian name, whether aided by the ſtatutes, 202, 203. 564

Miſpriſion. *See* Amendments.

Miſ-recital.

Of a ſtatute, *quid operatur*, 135, 136. 232

Of the king's patents, where it ſhall make them void, - 197, 198

Of a former leaſe, *quære* when the ſecond leaſe ſhall begin, 397, 398. 400. 502

Miſ-return of the Sheriff, 223, 224.

Miſ-uſing of Proceſs.

Where aided by the ſtatute of *Jeofails*, 90, 91

Miſ-trial.

What ſhall be ſaid to be a miſ-trial, 17. 20. 202, 203. 275. 284. 480

Where it ſhall be by miſ-naming a juror, 202, 203

Where twenty-three are only returned upon the *venire facias*, and twenty-four in the *habeas corpora*, and the twenty-fourth juror not returned was ſworn, whether it be aided by the ſtatute of *Jeofails*, 278

Where it is not aided by any of the ſtatutes, 284

Monaſtery.

Whether monaſteries diſſolved by the ſtatute of 27. *Hen.* 8. which were freed from the payment of tithe, be within the equity, &c. - - - 422-425

Monſtrans de Faits.

He who comes in by act of law, needs not ſhew the deeds of his eſtate, 209

Where upon a deed of covenant to raiſe an uſe out of a particular eſtate to which he is not party, and yet claims by that deed, whether he may plead the ſaid deed without ſhewing it, and where it ought to be ſhewn, - - 441, 442

Where the obligation ſhall be ſhewn by him who is aſſignee from the commiſſioners of bankrupts, - - 209

Mortgage.

Deviſe of all his goods and mortgages to his executors, is a good deviſe of the land mortgaged, - - - 37

Deviſe of his lands in *A.* and *B.* to ſeveral perſons and their heirs, and all the reſt of his goods, leaſes, eſtate, and mortgages, &c. whereof he was poſſeſſed, to his wife, whom he makes executrix, an eſtate for life only paſſed, - 447. 449, 450

Upon a mortgage, a daughter performs the condition to pay the money, a ſon is born after; whether the daughter may retain, or that the ſon may *oust* her, - 47

Mortuary.

Whether a prohibition lies for ſuing for a mortuary in the eccleſiaſtical court, 237, 238

Murder.

What ſhall be ſaid to be murder, 131. 537, 538

To kill an officer which comes to arreſt one, although he uſeth not the words of arreſt, nor ſhews his warrant, is murder, 68. 183. 537, 538

The often ſtriking and killing one who makes no reſiſtance is murder, - 131

N.

Name.

Name of dignity accepted by the plaintiff, hanging the writ; whether it be cauſe to abate it, notwithſtanding the ſtatute of 1. *Edw.* 6. - - 104

Name of dignity of a baron deſcends upon one who is ſued by the name of knight; what remedy he hath that execution ſhall not be awarded againſt him but as againſt a peer of the realm, - 205, 206

Name of dignity of baronet omitted; whether it be cauſe to abate the writ, and within the ſtatute of 1. *Edw.* 6. 371, 372

Name of corporations miſtaken, 570. 574

Name of a juror miſtaken, by what ſtatutes aided, - - 202, 203

Whether a ſheriff ought to add his name of office to returns, 189, 190. 570. 595

Where letters patents name lands by another name than when they came to the king, yet by a name certain, *quid inde operatur*, 168, 169

Nolle Proſequi.

Whether it may be entered againſt one defendant, and judgment prayed againſt the other, - - 238. 243

Non Obſtante.

Whether a *non obſtante* of a non-recital or miſ-recital of a former grant in the king's patent ſhall aid the grantee or not, 198

Nonſuit.

Upon a record of a *niſi prius* roll varying in ſubſtance from the plea roll, and a new *venire facias* awarded, agreeing to the plea roll, - - 203, 204

Notice.

When and to whom it ought to be given, 34, 35. 132, 133. 574. 577

Where it ought to be taken upon peril, &c. 392, 393

Of a by-law, when and how it ought to be given, - - 498

Nul Tiel Record.

Pleaded, - 297, 298. 565

Nuiſances.

Whether the erecting of a gate upon the highway to open and ſhut with the hand, be a nuiſance, - 184, 185

Whether every one may abate a nuiſance upon the highway, - 184, 185

Erecting of a tallow furnace, &c. a nuiſance, 510

Nuiſances ought to be certified into the court that they are abated or avoided, before the indictment ſhall be quaſhed, 584

O.

Oath.

Where an oath may be enlarged by direction of ſtate for the executing an office, without an act of parliament, - 26

Obligation.

Obligation with a condition and a bill obligatory, the difference, - 515

Shall not be void by vitious writing, 416, 418

Obligations and bills obligatory, how they differ, - - 515

Obligation general for the performance of covenants doth not alter the nature of rent, but that it ought to be demanded, 76, 77

Obligation with condition for performance of a ſimoniacal contract is void, 361. 425, 426

With a condition to reſign a benefice upon requeſt; whether the condition be ſimoniacal and makes the obligation void, 180

With a condition to pay upon the 31ſt of *September*, payment is pleaded to be at the day; and the verdict found there was no payment the ſaid 31ſt day 78

With a condition for the payment of money at a day; how it ſhall be diſcharged by acceptance of another bond before the day or after, - 85, 86. 193

With a condition that the huſband ſhall ſuffer his wife to enjoy the goods of her firſt huſband without claim; what ſhall be ſaid to be a breach thereof, - 204

By the huſband, with a condition to ſuffer his wife to make a will; whether it ſhall bind him, and what will the wife in ſuch caſe may make, 219, 220. 597

With a condition where it ſhall be good, according to the intention of the parties, though not according to the words, 219, 220

With a condition, where it ſhall be taken according to common parlance, &c. 226

Whether an obligation may be taken by a ſheriff, - - 287

Obligation, "*quinginta*" for "*quinquaginta*," 416, 417

Occupancy, 477.

Offices and Officers.

Officer and judge, where one may be, 138

Where an officer ſhall be puniſhed, although what he doth is by warrant from a juſtice of peace, - - 395

By what acts and for what cauſes offices may be ſeized, 59, 60 211. 491, 492

How they may be ſurrendered or determined, - - - 198

Where, if granted in reverſion after an eſtate for life, *exercendum per ſe vel ſufficientem deputatum ſuum*, it be good, 279. 556, 557, 558

In miniſterial offices deputies are allowable, 557

The office of marſhal of the king's bench not grantable for years, - 587

Of the cuſtody of a park or ſtewardſhip of a manor granted with the caſual profits; how it may be diſcharged or determined, 59, 60

Of a biſhop's chancellor, to whom grantable; and whether the grantee may be ſued in the ſpiritual court and deprived there, and thereby loſe his freehold, - 65

A ſentence in the ſtar-chamber cannot take away an office which is a freehold, 65

Office of a commiſſary; whether it may be granted to a lay perſon, - 258, 259

What offices be within the ſtatutes of 1. & 13. *Eliz.* of ſpiritual perſons, 259. 556, 557

What offices an infant is capable of, 556, 557

Offices by Inquisition.

Where they ought to be found before the king can take advantage of the condition broken, and where not, 100. 173
The difference and several uses of offices by commission under the great seal, and by inquisition under the exchequer seal, 173

Oxford University.

Its charters and privileges, 73. 87, 88

P.

Paraphernalia.

What they be, and whether the husband may dispose of them by his will, 343, 344. 346, 347

Parceners. *See* Joint-Tenants.

Pardons.

Exposition of a general pardon, 349
Whether a general pardon by parliament shall discharge costs taxed after the parliament, for offences committed before, 9. 46, 47. 67, 68. 193
Whether it shall discharge costs in the spiritual court in a suit for defamation, 160. 193
Whether a general pardon extends to pluralities, - - 354. 358
Whether the king's pardon, after a sentence in the star-chamber, shall discharge the offences and all disabilities appointed by the sentence, - - 55. 56
To what things the king's pardon by parliament of all offences before such a day, except for things depending by bill, &c. shall extend unto, - 67, 68. 176
Whether the king's pardon by parliament shall discharge excommunication or process of contempt at the suit of the party, 199
Where in a general pardon by parliament there be divers offences excepted; whether the court shall allow and discharge the party without pleading it, 449
Pardon granted in manslaughter, that the party shall not find sureties for his good behaviour, - - 597

Parish.

What shall be said such a parish as may make taxation for their poor, 92, 93. 394, 395
Clerk of the parish elected by the vestry, 559

Parliament.

Seditious acts and conspiracies plotted in parliament may be punished out of parliament in the king's bench, 181, 182. 209, 210

Parson, Patron, and Ordinary, 354. 355. 357.

Parson, patron, and ordinary, before 13. *Eliz.* c. made a lease for ninety-nine years, there being a former grant of the next avoidance. The parson dies; the grantee presents an incumbent, who avoided the lease: it is thereby totally avoided as to his successors, - - - 582
Whether an obligation entered by the parson to his patron to resign be simony, 180

Patents.

Where letters patents ought to be pleaded *sub magno sigillo Angliæ*, - 460
Where letters patents name lands by another name than when it came to the king, yet by a name whereby they are then known, *quid inde operatur*, - 168, 169
Where the king's patents do not recite or mis-recite a former grant of the same thing; whether it shall be void, or whether a *non obstante* shall not help it, 197, 198
Patents of the places of the justices of the king's bench and common pleas, how they vary from the barons of the exchequer, and how they shall be determined, 203
Whether there can be a patent for *oyer* and *terminer* in civil causes, - 318
Justice of peace by patent; whether it may be, - - - 223

Payment.

Where payment of damages to the plaintiff shall be pleaded in a *scire facias* to have execution or restitution, - 328
Where payment being against matter of record, cannot be pleaded as a discharge, 328

Peer of the Realm.

What execution shall be taken forth against him, who, hanging the suit, is made a peer of the realm, - 205, 206
Whether he shall answer in the star-chamber, &c. upon his oath or upon his honour, 64
Sued by process to outlawry; what remedy he hath to stay it, - 205, 206
Viscount, of what antiquity, 136
There cannot be *possessio fratris* of a barony, 601

Place.

In what place and county every action is to be brought, - 143. 183, 184

Whether

Whether a fine or recovery may be by the name of a known place, out of any vill or hamlet, - - 269. 276

Pleas and Pleadings.

What amounts only to a general iſſue is not good, - - 157
Where adjudged ill for miſpriſion, 427. 436, 437
Where the pleading the performance of a condition in the generality according to the words of the condition, is good, 195
Where neceſſary circumſtances ſhall be intended in pleading, - 160. 186. 195
How a copyhold eſtate ſhall be pleaded, 190
Statute ſtaple, how it ought to be pleaded, 363
Where the pleading of an *exoneravit*, without ſhewing how, ſhall be good, 384
Pleading of the performance of covenants, according to the condition of the obligation, where one of them is in the disjunctive, is not good, - - 421
Pleading the inducement to a traverſe needs not be ſo preciſe as another plea, - 442
Of a commiſſion by letters patents or proclamation, and doth not ſay *ſub magno ſigillo*: whether it be good, 461. 180, 181
Pleading of a feoffment, and doth not ſay by deed, and yet good, - - 482
A payment being againſt matter of record cannot be pleaded as a diſcharge, - 328
Where matter of fact may be pleaded in diſcharge of a record, - 329
Eſtates determined need not be mentioned in pleading, - 420, 421. 506
How a general pardon, where divers offences are excepted, is to be pleaded, - 449
Surrender *dimiſſionis prædictæ*, and not of the eſtate or tenements, &c.: whether good pleading, - - 101
See tit. Payment.

Pledges.

Where pledges *ad proſequendum* are omitted: whether it ſhall be cauſe of ſtay, or to avoid the judgment, - 92. 161. 594
Whether money may be taken for pledge, 446

Poſſibility.

Cannot be transferred over, - 477
Limitation of an eſtate upon a poſſibility after a poſſibility, is not good, - 577

Poſſeſſio Fratris.

Cannot be of a dignity, - 601

Poſſeſſio Sororis, 87.

Præmunire.

Attainders therein, how they ſhall relate, 172

Prerogative. *See* King.

Preſcription.

To have warren, how it ought to be pleaded, 311
That, *per legem terræ*, he ought to be diſcharged of the payment of tithes for wood ſpent in his houſe for firing, or for fences, is not good, - - 113
Where it lies for inhabitants or occupiers of land, - - 418, 419
Where preſcription ought not to be perſonal, but in the thing preſcribed, 325, 326. 419
Preſcription againſt a preſcription cannot be, but the one ought to be traverſed and put in iſſue, - - 432
Preſcription *de non decimando* of lands in the hands of the king or ſpiritual perſon; if they come to a layman, the preſcription is determined: and ſo where a ſpiritual perſon hath a diſcharge by privilege, 94

Preſentment to Churches.

By the king, under what ſeal it ought to be, 99, 190
Whether the preſentation or vacancy be traverſable in a *quare impedit*, - 61, 62
Præſentatio ad eccleſiam is always to be intended of a parſonage, - 74

Principal and Acceſſory.

Acceſſory ought not to be condemned, but where the principal is attainted, - 567

Priſon and Priſoner.

Every place where one is reſtrained of his liberty is a priſon, - - 210
Priſon of the king's-bench and Fleet, how they may be removed to other places, 210. 466
Priſoners, how to be ordered, - 14 466
Priſoner for felony, where he ſhall have counſel, and in what matters, 134. 147. 175. 365
See more tit. Impriſonment.

Privileges.

Of the univerſities, - 73, 74. 87, 88
For ſerjeants at law, and their ſervants, to be ſued in the common pleas, and not elſe where, - - - 84, 85
For attorneys and clerks of the courts, not to be preſſed for ſoldiers, - 11
Not to bear offices in their pariſh, 389

Privity.

Where actions ſhall be brought upon the privity of contract, and where upon the privity of eſtate, - 143. 184. 188

Procedendo.

Granted into *London*, where the action is maintainable, which lies not in the king's-bench, - - 350. 487

Proceſs.

Proceſs.

Where proceſs miſ-ſued, is aided by the ſtatute of *Jeofails*, - - 90
Subpœna, how it ought to be ſerved, - 540

Proclamations.

How they ought to be made and pleaded, 180, 181

Prohibition.

What ſurmiſes ſhall be good in a prohibition to ſtay ſuit for tithes, - 393
For ſuit for tithes of foreſt land purchaſed of the king, - - - 94
To ſtay a ſuit for tithe of fiſh taken in rivers and in the ſea, - - 284. 339
To ſtay a ſuit for tithe of young trees planted in a nurſery upon purpoſe to be rooted up and ſold to be planted in other pariſhes, 526
To ſtay ſuit for defamation for matter ſuable at the common law, 110. 201. 285. 309 340. 456, 457
Where the wife ſues the huſband in the ſpiritual court *propter ſævitiam, &c.* 16. 220
Whether grantable to ſtay a ſuit in an appeal for ſaving coſts, the principal cauſe being diſcharged by the pardon, - 46
To ſtay a ſuit in the eccleſiaſtical court againſt an adminiſtrator, to make diſtribution amongſt the kindred, after debts and legacies paid, - - 62, 63. 194
Where the chancellorſhip of a biſhop is granted for life, and he queſtioned in the eccleſiaſtical court concerning his ability to exerciſe that office, thereby to deprive him, a prohibition was granted, 65
For ſuing in the vice-chancellor's court at *Oxford* for temporal cauſes, - 73. 88
To ſtay a ſuit in the ſpiritual court for a will of goods and lands, 94. 115. 165, 166. 395, 396, 397
Prohibition denied, becauſe the party who prayed it had long and often before in that ſuit admitted the juriſdiction of thoſe eccleſiaſtical courts, - - 97
Upon the ſtatute 23. *Hen.* 8. for ſuing out of the dioceſe in the prerogative court for a legacy, upon a will proved there, 97. 162
To the high commiſſioners, where they ſentence a cauſe after a general pardon, or meddle with a cauſe not warranted by *primo Elizabethæ*, although it be in their commiſſion, - - 113, 114
Prohibition for two, if grantable where they ſeverally ſued in the ſpiritual court, 162
Where a prohibition may be granted after conſultation upon the ſame libel, 208
Where it may be granted upon a ſuit for a mortuary, - - - 238
If granted, and the party ſtill proſecutes his ſuit in the ſpiritual court, he ſhall pay damages and coſts for his contempt, 559
Where a prohibition lies upon ſurmiſe that the lands of the monaſteries were diſcharged by the ſtatute of 31. *Hen.* 8. from payment of tithes, 422, 423, 424, 425
Whether a prohibition lies for a thing done in *Ireland*, - - 264
Prohibition to ſtay a ſuit in the Stannaries, 333
To the court of the Marches of *Wales*, 531. 595. 597
To the court of requeſts for ſuing there, where he was barred by the common law, or by the ſtatute of limitations, 595, 596

Property.

Whether the property of timber-trees, cut down in the time of the leſſee for life, belongs to the leſſor or leſſee, - 274
In creatures *feræ naturæ*, how to be claimed, 544, 545. 554

Proviſo.

Where a proviſo in a ſtatute may be given in evidence without pleading, &c. - 315
How proviſoes in deeds are to be conſtrued, 128, 129. 183

Q.

Quare Impedit.

Whether the incumbent, who comes *in pendente brevi*, ſhall plead in bar, - 105
What damages ſhall be recovered in a *quare impedit*, - 145. 175. 342. 348
Preſentation alledged and vacancy thereof by reſignation or death: whether the preſentment or the manner of vacancy may be traverſed, and what matter is principally traverſable, 50, 51. 105. 174. 380. 586
Whether a general pardon extends to pluralities, - 354, 355, 356, 357, 358
The king may preſent to any church which he hath in right of his ward, either under the great ſeal, or under the ſeal of the court of wards, - 99, 100
Whether a ſucceeding king may take advantage of a lapſe incurred in the time of his predeceſſor, - 335, 336

Que Eſtate.

Where it ought to be ſhewn, - 54. 575

Quod Ei Deforceat.

Whether it lies at the common law, 444, 445
How it ſhall be brought in *Wales*, 178, 179. 262. 310, 311. 444, 445
See more in tit. Writ.

Quo Warranto.

Where amendment ſhall be in a *quo warranto*, - - - 144

Raſure

R.

Raſure of a Deed.

Where it ſhall determine the intereſt paſſed thereby, - - 398. 993

Recognizance.

To keep the peace, how it ought to be taken, 390
For the good behaviour, what acts ſhall be breach thereof, - 498, 499
Recognizance by bail in the common pleas, how it differs from the courſe of bail in the king's bench, - 481

Record.

Whether a record of the king's bench may be removed by *certiorari* into the chancery, and ſent by *mittimus* into the other courts to be executed or otherwiſe, 297, 298
Whether a record may be avoided by matter of *fait*, - - - 329
Where a record for the prolixity of the pleadings therein was ill and the clerk fined therefore, - - 164

Recovery.

Of damages in one action where it ſhall be a bar in another action, - 35, 36
Againſt an infant by his guardian, who vouches, &c.: whether it ſhall bind the infant, - - - 307
Of the moiety of land, is good for a third part, where he who ſuffered the recovery had but a third part of the land recovered, 110
Common recovery againſt a diſſeiſee to an uſe, is good againſt him and his heirs, 388, 389

See tit. Common Recovery.

Recuſants and Papiſts, 10. 18. 504. 333.

Relation.

How acts done in Term-time ſhall relate to the firſt day of the Term, - 102
To what time a general pardon ſhall relate, 9
Whether a judgment acknowledged ſhall relate to the firſt day of the Term or to the *quarto die poſt*, - - - 102
How deeds inrolled ſhall be conſtrued to have relation to make acts good, 110. 217, 218, 571, 572
Relation of a *liberate* to the extent and return, - - 148, 149, 150
Of an attainder in a *præmunire*: whether it ſhall be for the time of the offence, 172

Releaſe.

Whether a releaſe ſhall be from the time where a *nolle proſequi* is entered againſt the one defendant, and judgment is given againſt the other, - 239. 551
Releaſe by a covenantee, where it ſhall be a bar againſt the aſſignee of a covenant, the breach being after the aſſignment, 503
Releaſe by huſband of his wife's ſuit in the ſpiritual court for defamation, is a good releaſe *quoad* the coſt, but not *quoad* the defamation, - - 222
Two obligees jointly and ſeverally; one being ſued and pleading, the plaintiff enters a *retraxit*: whether this be a releaſe and diſcharge to the other, - 551

Relief. *See* Ward.

Remainder.

Whether the remainder of a term may be limited after the death of the firſt deviſee, without iſſue then living; and whether it may be deſtroyed by the alienation of the firſt deviſee, - - 230
Remainder to the firſt ſon, tenant for life, who hath iſſue, and to his heirs; and ſo to the ſecond ſon; remainder to his heirs: whether the fee veſts preſently, - 364

See Reverſion.

Remitter.

Where it ſhall be eſtopped by a warranty deſcended, - - 145

Rent.

Ought to be demanded, although there be an obligation for the performance of all covenants and payments, - 76, 77
Rent-charge for life ſuſpended by acceptance of a leaſe for years of the land, is again revived by ſurrender of the leaſe, 101
Rent charged by tenant for life, and confirmed by him in remainder within age, how it ſhall enure and how bind, - 103
Where rent is granted of 14l. *per annum*, *habendum* 7l. from ſuch a time for 28 years, and the other 7l. from another time for 28 years: and if the ſaid 14l. *per annum* be behind, &c. that he may diſtrain, &c. whether this be one or ſeveral rents, 154
Where the leſſee covenants to pay to his leſſor and his heirs ſuch an annual ſum: whether this ſhall be accounted a rent reſerved, - - - 207
Where in a leaſe for years rent is covenanted to be paid to the leſſor, his heirs and adminiſtrators: whether it ſhall be paid to the heirs and executors, - 207
Whether rent reſerved to one during the term ſhall go to his executors, - 289
Reſervando et ſolvendo rent to the huſband and wife, upon a leaſe of land of the huſband's: whether it ſhall be a good reſervation to the wife - 288, 289
Reſervation in a leaſe of the ancient rent, not men-

mentioning what in certain, if it reſerves or excepts any part anciently demiſed, it makes it a void reſervation, - 95, 96
In what county debt for rent ought to be brought (*See* Debt).
Rent ſeek granted out of *Dale*, payable at *Sale*, demand thereof at *Dale* is good, 508
Rent ſeek granted, and 6d. delivered in name of ſeiſin thereof, good, - 508
Aſſiſe brought of a rent ſeek, - 508

Repleader.

Shall not be allowed where admiſſion, inſtitution and induction is pleaded, and iſſue is joined upon the admiſſion and inſtitution, where it ought to have been upon the induction, - - 380

Replication.

Where a replication at large may be to a bar at large, - - 384
Intendment ſhall not make a replication good, - - - 80. 94
If the replication be not good, yet if the bar be ill in ſubſtance, judgment ſhall be for the plaintiff, - - 5
Where a replication ſhall be ill, becauſe he did not conclude his plea; *et hoc petit, quòd inquiratur per patriam*, - 164
Where there ought to be a ſpecial replication, - - - 514

Repugnancy.

Where a repugnant clauſe to the premiſes ſhall be void, and ſhall not deſtroy the premiſes, - - 367
Where a verdict ſhall be void, by reaſon of repugnancy, - - 495

Requeſt.

Where it ought to be alledged in an *aſſumpſit*, - - 34, 35. 139
Where ſpecial requeſt ought to be alledged, 386
Where a man is bound to do a thing upon requeſt, or reaſonable requeſt. 299, 300
See tit. Demand.

Receipt.

Where receipt ſhall be after receipt, and what ſhall be a traverſe where cauſe of receipt is alledged, - 262, 263

Reſcous. *See* Execution.

Reſervation. *See* Rent.

Reſpondes Ouſter.

Where it ſhall be awarded, - 9. 568

Return.

What ſhall be a good return by the ſheriff in a *ſcire facias* upon a recognizance againſt the heir and *terre-tenant*, 295, 296. 312, 313
Upon *an extent* made after the death of the conuſee, - 450, 451, 452. 458. 459
Whether a return by the ſheriff of a *venire facias*, by his name and addition, *nuper vicecomes* be good or no, 189, 190. 570
In an *habeas corpus*, the returning the cauſe of the commitment of the priſoner ought to be certain, - - 133

Retraxit.

Two obligees jointly and ſeverally, one being ſued and pleading, the plaintiff enters a *retraxit*: whether this be a releaſe and diſcharge to the other, - 551

Reverſion.

Where a reverſion only is granted, whether lands in poſſeſſion paſs thereby, - 400
Where the leſſor waves the poſſeſſion, the reverſion falls *in eſſe* before the leſſee for years enter, - - 113
Grant of a remainder or reverſion to commence *in futuro* is not good, - 548

Revocation.

What ſhall be ſaid to be a revocation of a will, 23, 24
What ſhall be ſaid to be a revocation of a former deed, - - 472

Riots.

Judgment in a riot and reſcous, 506, 527

S.

Scire Facias.

It cannot be upon a judgment in any court but in that wherein it was given, although it be removed in chancery by *certiorari et mandamus* by *mittimus* out of the king's bench, - - - 34
The firſt *ſcire facias* upon a recognizance to have execution, ought to be in the county where it was acknowledged, - 313
Two *ſcire facias* into two ſeveral counties, although death be alledged in the one, it ſhall not prejudice the other, - 518
Granted againſt the adminiſtrator upon the recovery of a debt againſt an executor, who died inteſtate of a debt of the teſtator's, - - - 167
Whether *ſcire facias* lies to have execution, where the party taken in execution by *capias* eſcapes and reſcues himſelf, 240. 255
To have execution of a judgment in debt by the huſband, - 208. 225
Upon a recognizance of the father's againſt the heir and *terre-tenant*, how it ought to be returned, - 295. 312, 313

Brought to avoid a patent of an office upon cauſe of forfeiture, - 491, 492
Whether one claiming by a conuſor by fine or other record, may maintain a diſtreſs without a *ſcire facias*, - 598
No writ of error lies in the exchequer chamber upon a judgment in a *ſcire facias*, 286. 300. 464
Whether a *ſcire facias* may iſſue againſt the bail, where no *capias* is awarded againſt the principal, - - - 408
Brought for not paying a fine aſſeſſed upon him at the juſtices ſeat of the foreſt, 409
Upon a recognizance of the good behaviour, 498, 499

Seal.

Where *ſub magno ſigillo Angliæ* ought to be pleaded, either in letters patents or proclamations, - - 180, 181. 461
What things ſhall paſs under the exchequer ſeal, - - - 513. 528
What ſhall paſs under the ſeal of the court of wards, - - - 99, 100
For inſtitution and induction, it needs be under the epiſcopal ſeal, - 342

Seiſin.

Where in an avowry ſeiſin of the rent ought to be alledged, and wherein it is only traverſable, - - 82, 83, 84
Jury finding a ſeiſin of one coparcener is a ſufficient finding for both, - 521

Serjeants at Law.

Their manner of creation, 1, 2, 3, 4. 67. 85.
Created, - 12. 71. 84. 197. 567. 584. 600
Their writ ought to be returnable at a day certain in Term, - - 3
Where they and their ſervants ought to ſue and be ſued, - - 84
Serjeant and chief juſtice, the ſame perſon ſworn the ſame day, - - 2
Chief juſtice removed doth practiſe after as ſerjeant at law, - 375

Servant.

Where in juſtification he ſhall be in a better condition than his maſter, - 447

Sheriff.

When he is to be choſen and nominated in the exchequer, 13, 14, 595
His oath, by what law, and how there may be an addition thereto, - 25, 26
Whether he ought to add his name of officer to returns, 189, 190. 572, 573. 595
Whether he may execute a writ where himſelf is party, - - 416
If he arreſt one by *capias*, and returns not the writ at the day, it is a tortious arreſt: but not ſo in his ſervant or bailiff, 446, 447
Upon eſcape of one in execution, it is at the parties election to ſue the priſoner or the ſheriff, - - - 109
How he ought to execute judicial writs, notwithſtanding the death of the party, 450, 451. 458, 459
What fees he ought to take for ſerving executions, - - - 287
What actions his executors are ſubject unto, 539, 540
Information againſt an under-ſheriff for ſeveral foul miſdemeanors, - 569

Ship-money, 524. 601.

Simony.

What it is, and if it were an offence before the ſtatute of 31. *Eliz.* whereof the common law took any notice, 337. 351. 361
Whether it be ſuch an offence as ſhall avoid an *aſſumpſit* or obligation, 337. 351. 361. 425
Whether an obligation entered by the parſon to his patron to reſign be ſimony, - 186

Soldiers.

Whether their departing from their conductor without licence be felony, - 71
Clerks and attornies of the courts at *Weſtminſter* ought not to be preſſed for ſoldiers, 11

Solicitor.

Who may be a ſolicitor, and whether he may take any fees, - - 165
SOLICITOR GENERAL, his annual fee, 376

Statute Staple.

How it ought to be pleaded, - 363
The proceedings thereupon in chancery, 451, 452. 458, 459
Whether one who claims by a conuſor by fine or other record, may maintain a diſtreſs without a *ſcire facias*, - 598

Statutes.

How they are to be expounded, 34. 83, 84, 85, 533
Where a proviſo in a ſtatute may be given in evidence without pleading, - 315
Where a ſtatute miſ-recited ſhall make the declaration ill, - 135, 136. 232, 233
Statutes of explanation muſt be conſtrued only according to the words, and not with any equity or intendment, - 34
See tit. Damages.

EDWARD THE FIRST.

Statute of *Merton*, cap. 1. dower, - 43
Statute 12. *Edw.* 1. of *Rutland*, *quod ei deforceat*, - - - 445
Statute of *Winton*, 13. *Edw.* 1. hue and cry, 26. 37. 41. 158. 197. 336. 379.
Weſtm. 2. c. 1. *de donis conditionalibus*, whether it extends to copyhold, - 43. 533
Weſtm. 2. c. 2. pledges found upon replevin, 446. 594

Weſt. 2. c. 3. *cui in vita*, - 43
Weſt. 2. c. 4. *quod ei deforceat*, - 445
Weſt. 2. c. 20. *elegit*, - 44
Weſt. 2. c. 46. calling down of hedges, &c. 280, 281. 439, 440. 560

EDWARD THE SECOND.

Stat. 12. *Edw.* 2. c. 5. return by ſheriffs, 189
12. *Edw.* 2. for eſſoigns, - 341

EDWARD THE THIRD.

4. *Edw.* 3. c. 17. actions by executors, 297
9. *Edw.* 3. c. 3. appearance, - 564
18. *Edw.* 3. ſheriff's oath, - 26
25. *Edw.* 3. c. 1. lapſe of benefices, 335, 336
25. *Edw.* 3. c. 2. treaſon, 167. 332, 333
25. *Edw.* 3. c. 19. execution againſt the king's debtors, - 390
31. *Edw.* 3. c. 11. adminiſtrators, 106. 201
31. *Edw.* 3. c. 17. the ſheriffs tourn, 275
50. *Edw.* 3. c. 46. prohibitions, 208

RICHARD THE SECOND.

2 *Rich.* 2. c. 5. *de ſcandalo magnatum*, 135, 136
15. *Rich.* 2. c. 2. forcible entries, 486

HENRY THE FOURTH.

2. *Hen.* 4. c. 11. the admiralty, 296, 297. 603
11. *Hen.* 4. c. 9. return of jurors, 134

HENRY THE SIXTH.

8. *Hen.* 6. c. 9. forcible entries, 201
8. *Hen.* 6. c. 12. jeofails, 203. 278. 564
23. *Hen.* 6. c. 10. ſheriffs and their officers, 267. 309. 438. 448, 449

EDWARD THE FOURTH.

1. *Edw.* 4. c. 1. fines and amercements in ſheriffs tourns, - 275

HENRY THE SEVENTH.

3. *Hen.* 7. c. 1. the ſtar-chamber, 168
3. *Hen.* 7. c. 2. carrying a woman away againſt her will, 483. 385. 488. 493
3. *Hen.* 7. c. 10. coſts, where the defendant ſueth a writ of error, 145. 401. 425. 590, 591
4. *Hen.* 7. c 24. fines, 175. 183. 194. 435
7. *Hen.* 7. c. 1. ſoldiers, - 71, 72
11. *Hen.* 7. c. 20. jointures, - 244

HENRY THE EIGHTH.

3. *Hen.* 8. c. 1. ſoldiers, - 71, 72
7. *Hen.* 8. c. 4. damage, and coſts to the avowant, - 498. 533, 534, 535
14. *Hen.* 8. c. 5. phyſicians, 256, 257
21. *Hen.* 8. c. 5. adminiſtration and probate of teſtaments, 106. 201, 202
Stat. 21. *Hen.* 8. c. 6. mortuaries, - 238
21. *Hen.* 8. c. 13. pluralities, 146. 354, 355, 356, 357. 428. 475, 476
21. *Hen.* 8. c. 19. damages and coſts to the avowant, 498. 533, 534. 542
23. *Hen.* 8. c. 4. ſelling beer, &c. 112
23. *Hen.* 8. c. 9. ſuing out of the diocеſe, 97. 162. 339
23. *Hen.* 8. c. 15. coſts upon nonſuit, 542
24. *Hen.* 8. c. 5. felons, - 544
26. *Hen.* 8. c. 6. indictments in caſes of felonies to be enquired of in adjoining counties, - 332
26. *Hen.* 8. c. 13. forfeiture for treaſon, 427, 428, 429, 430
27. *Hen.* 8. c. 10. uſes, - 44. 218
27. *Hen.* 8. c. 16. enrolments, 109, 110. 217, 218
27. *Hen.* 8. c. 28. monaſteries, 422, 423, 424
31. *Hen.* 8. c. 1 jointenants, - 44
31. *Hen.* 8. c. 13. monaſteries to be diſcharged of tithes, 422, 423, 424
32. *Hen.* 8. c. 1. diſpoſing land, &c. 34
32. *Hen.* 8. c. 2. limitations, - 81
32. *Hen.* 8. c. 9. champerty, 43. 232
32. *Hen.* 8. aſſignees, - 24
32. *Hen.* 8. c. 28. leaſes, &c. 22, 23. 44. 158
32. *Hen.* 8. c. 30. jeofails, 90. 278. 281
32. *Hen.* 8. c. 32. partition betwixt jointenants and tenants in common, 43
32. *Hen.* 8. c. 34. grantees of reverſion, 44
32. *Hen.* 8. c. 36. fines to bar the iſſue in tail, - - 435
32. *Hen.* 8. c. 37. executors to recover rents, &c. - 471, 472
33. *Hen.* 8. c. 1. falſe tokens, - 564
33. *Hen.* 8. c. 20. forfeiture in treaſon, 427, 428, 429, 430
34. *Hen.* 8. of *Wales*, - 171. 595
34. *Hen.* 8. c. 8. phyſicians and chirurgeons, - - 256, 257
34. *Hen.* 8. c. 26. *Wales*, - 342
37. *Hen.* 8. c. 17. doctors of law, &c. 258, 259

EDWARD THE SIXTH.

1. *Edw.* 6. c. 7. diſcontinuance of proceſs, - - 104
1. *Edw.* 6. c. 14. chanteries, 81. 148. 249. 455, 456
2. *Edw.* 6. c. 13. not ſetting out tithes, 513
2. *Edw.* 6. c. 13. tithes of barren heath, 208
5. *Edw.* 6. c. 4. ſtriking in church, 464, 465
5. *Edw.* 6. c. 14. ingroſſers, foreſtallers, &c. - 231. 314, 315
5. *Edw.* 6. c. 15. curriers, - 588

PHILIP AND MARY.

1. *Mary*, c. 9. phyſicians, - 256, 257
1. & 2. *Phil.* & *Mary*, c. 12. diſtreſſes impounded, - 561

Stat.

Stat. 4. & 5. *Phil. & Mary*, c. 3. taking a maid, &c. - - 465

ELIZABETH.

1. *Eliz.* the high commiſſion, 113, 114. 220. 222
1. *Eliz.* c. 19. leaſes and grants by biſhops, 16, 17. 47, 48, 49, 50. 95, 96. 258. 279, 280. 556, 557
5. *Eliz.* c. 4. uſing a trade not being apprentice, &c. 316. 347. 499. 516, 517
5. *Eliz.* c. 4. binding out apprentices, 179
5. *Eliz.* c. 9. perjury, - 99. 353, 354
5. *Eliz.* c. 9. witneſſes *ad teſtificandum*, 522, 523. 540, 541
5. *Eliz.* c. 22. leather, - 588
5. *Eliz.* c. 23. *excommunicato capiendo*, 583
13. *Eliz.* c. 7. bankrupts, 149. 568, 569
13. *Eliz.* c. 10. leaſes by ſpiritual perſons, - - 22. 84
18. *Eliz.* c. 3. baſtards, 341. 350, 351. 436. 470, 471
18. *Eliz.* c. 13. amendments, 92. 203. 223. 278. 282.
27. *Eliz.* c. 5. demurrers, - 185
27. *Eliz.* c. 8. errors in the exchequer-chamber, 142. 286. 300. 464. 514
27. *Eliz.* c. 13. hue and cry, 26. 37, 38. 40. 212, 213
27. *Eliz.* c. 16. curriers, - 588
29. *Eliz.* c. 4. the ſheriff's fees upon executions, - 287
31. *Eliz.* c. 6. ſimony, 330, 331. 425
35. *Eliz.* c. 2. popiſh recuſants.
39. *Eliz.* c. 15. robbing in a dwelling-houſe, - - 473, 474
43. *Eliz.* c. 2. overſeers for the poor, 92, 93. 394, 395
43. *Eliz.* c. 4. charitable uſes, 40. 525, 526

JAMES THE FIRST.

1. *Jac.* 1. c. 11. polygamy, 461, 462, 463
1. *Jac.* 1. c. 12. witchcraft, - 141
1. *Jac.* 1. c. 22. curriers, 588, 589
3. *Jac.* 1. c. 4. popiſh recuſants, 504
3. *Jac.* 1. c. 8. *ſuperſedeas* upon a writ of error, - - 59
3. *Jac.* 1. c. 15. relief of the poor, 572
4. *Jac.* 1. c. 3. coſts to defendants, 29
7. *Jac.* 1. c. 5. double coſts to officers, 175. 219. 285, 286. 467
21. *Jac.* 1. c. 4. informations, 112. 146. 316
21. *Jac.* 1. c. 13. jeofails, 92. 203, 204. 278. 312, 313. 480. 564.
21. *Jac.* 1. c. 16. limitation of actions, 115. 139. 145. 163. 294, 295. 381. 405. 513
21. *Jac.* 1. c. 16. coſts in action, 163. 307
21. *Jac.* 1. c. 19. bankrupts, 149. 185. 188. 190. 549, 550. 568, 569
21. *Jac.* 1. c. 23. utter barriſters, 79
21. *Jac.* 1. c. 12. tendering damages in treſpaſs, - - 264
21. *Jac.* 1. *ſuperſedeas*, &c. - 487

CHARLES THE FIRST.

Stat. 3. *Car.* 1. c. 4. baſtard children, 341. 350, 351. 436. 470, 471

Suggeſtion.

In a prohibition ſhall be tried by two witneſſes, - - - 208

Summons and Severance.

Of one executor, the other proceeds and recovers: whether mention need be made of him who is ſummoned and ſevered, &c. 420, 421

Sunday.

Proceſs ſerved upon it puniſhed, &c. 602

Superſedeas.

To a *procedendo*, where it is miſ-awarded and well allowable, notwithſtanding the ſtatute of 21. *Jac.* 1. - 487
Awarded to an inferior court, becauſe their proceedings were not before an utter-barriſter, - - - 79

Superſtitious Uſes, 248, 249. 455, 456.

Surrender.

What ſhall be a ſurrender, and how to be pleaded, - - 101, 102
If a patentee for life or years of the king, of land or office, takes a new leaſe or patent thereof for another eſtate: whether it be a ſurrender, - 197, 198
By a copyholder for life, to the uſe of another, to whom the lord granteth it for his life; he dies: whether the firſt copyholder ſhall have the land back again as the remnant of the eſtate in poſſibility remaining in him, - - 204, 205
Surrender *dimiſſionis prædictæ*, and not of the eſtate or tenements, &c.: whether good pleading, - - - 101
Grantee of a rent for life accepts of a leaſe for years of part of the ſame land, and ſurrenders the ſaid leaſe: whether the rent remains ſuſpended during the years, or be revived preſently by a ſurrender, 101, 102
See Copyholds.

T.

Tail.

What ſhall make an eſtate tail - 22
Whether it ſhall be by a deviſe to a brother and his heirs; and for default of ſuch heirs, to his ſiſter and her heirs, - 57, 58
How an eſtate tail in the king may be barred, - - 96, 97
Habendum to huſband and wife, to the uſe of them and the heirs of their bodies: whe-

ther it be an eſtate tail or for life only, 230, 231. 245
Where an eſtate tail is barred by fine: whether it may be revived by confirmation of him who hath the fee, - 478
See tit. Tenant.

Tales.

De circumſtantibus; where it ſhall be, 341
Tales by *proviſo* for the defendant cannot be in the ſame Term that the jurors make default, - - 484

Tenant.

Tenant in tail, reverſion to the king, makes a feoffment, and after is attainted of treaſon: whether the eſtate or right of the tail is forfeited by the ſtatutes of 26. *Hen.* 8. c. 17. and 33. *Hen.* 8. c. 27. 427, 428, 429, 430
Tenant in common may be by a deviſe to three, their heirs and aſſigns, part and part alike, - - - 75
Tenant at will makes a leaſe for years, rendering rent; the leſſee enters and pays the rent: whether the leſſee be in as leſſee or diſſeiſor, - 302, 303
See tit. Tail.

Tender.

Whether tender of a rent ought to be demanded, where one is obliged to perform all covenants and payments in a leaſe, 76
When and where tender of amends for treſpaſs by the ſtatute of 21. *Jac.* 1. c. 12. is to be made, - - 264
Whether traverſe ſhall be of the tender of a marriage *in valore maritagii*, or in an action of the caſe in nature thereof, - 503

Term.

For what purpoſe the Term ſhall be ſaid to begin the firſt day, and when upon the *quarto die poſt*, - 14. 102
Term adjourned to *Reading*, - 13
See tit. Adjournment.

Teſtament.

Rules concerning expoſition of teſtaments, 51, 52. 369
By whom a teſtament or will may be made, and how revoked, - 51, 52. 161. 198
Where the teſtament of a *feme covert* ſhall be good, - - 26. 219, 220
Feoffment to ſuch uſes as ſhall be declared by his will; he deviſeth the land as a declaration of the uſes: whether it ſhall enure as a declaration of the land itſelf, 39
Probate of teſtaments, where to be made, 395, 396, 397
See tit. Deviſes *and* Prohibition.

Teſte.

How the *teſte* of writs judicial ſhall be made upon the death of THE CHIEF JUSTICE, 393

Time.

What time one ſhall have where he is bound to do a thing after requeſt or reaſonable requeſt, - - - 299
To make a thing parcel in reputation, what time is required, - 269. 308
It is not material that the time of diſturbance ſhould be alledged in a declaration, when it is but collateral to the promiſe, 497

Title.

What ſhall be a ſufficient title in a declaration to a water-courſe, - 499, 500

Traverſe.

Where it ſhall be to the manner of vacancy alledged in a *quare impedit*; and what matter is principally traverſable, 61, 62, 105. 586
Whether if it be taken where it ought not to be, it makes not the plea double or ill; and where it ought to be ſpecially alledged upon a demurrer, - 61, 62. 105
Where the taking a traverſe may be perilous, 324. 328
Where and in what caſes there may be a *traverſe upon a traverſe*, - 305. 586
Where a traverſe ſhall or ought to be to the matter to induce a traverſe, - 174
Inducement to a traverſe ſhall not be ſo preciſely pleaded as another plea, - 443
Whether the inducement thereunto ought always to be ſufficient in matter, 266. 336
Whether traverſe ought to be a ſpecial cauſe of receipt, - - 226
Where there is no abſolute confeſſing and avoiding there ought to be a traverſe
Where the traverſe of the day ſhall make the plea ill, - - 503
Whether the traverſe ſhall be of the tender of a marriage *in valore maritagii*, or in an action upon the caſe in nature thereof, 503
Where the defendant makes title by a later grant from the ſame party, there the plaintiff needs not traverſe it, - 581

Treaſon.

To go in a warlike manner with a multitude to aſſault a privy-councillor at his houſe is treaſon, - - 583
The breaking of a priſon wherein traitors are in durance and cauſing them to eſcape is treaſon, although the parties did not know there were any traitors there, - 583
There is nothing treaſon at this day but what is made ſo by the ſtatute 25. *Edw.* 3. c. 2. 317. 333
No words are treaſon unleſs made ſo by ſome particular ſtatute,
Judgment in treaſon for ſpeaking traitorous words againſt the king, - 333
Judgment in treaſon for counterfeiting *money*, - - - 383
Petit treaſon in the wife to murder her huſband, and judgment thereupon, 531, 532

Treſpaſs.

Whether action of treſpaſs lies where bail ſufficient is tendered to A SERJEANT upon an arreſt upon a plaint in *London*, and he refuſe to accept thereof, - 196
It is no plea in treſpaſs for cutting his nets and oars, that he cut them becauſe he found the plaintiff fiſhing with them in his waters, - - - 228
For killing an hawk, without ſhewing what kind of hawk it was, and that ſhe was reclaimed, whether good, - 18
Treſpaſs for fiſhing *in ſeparali piſcariâ ſuâ*, and taking *piſces ſuas ibidem*, - 554
Treſpaſs of aſſault and battery 2. *Julii*: the defendant juſtifies *en ſon defence* 9. *Julii*, 514, 515
In another place, &c. - 572, 573
See tit. Action.

Trial.

A fact in one county cannot be tried in another, - - - 247
Whether upon indictments traverſed trial may be the ſame day or ſeſſions, 315. 340. 438. 448
Trial of a priſoner by virtue of a commiſſion of *oyer* and *terminer*, without any commiſſion of gaol-delivery, may be the ſame day of the enquiry, - - 583
Where trial may be in an *Engliſh* county adjudged for a fact committed in *Wales*, 245. 248
Upon a record of *niſi prius* varying in ſubſtance from the plea roll, the trial is merely void, - 20, 21. 194
Trial of an iſſue upon a *niſi prius* roll where there is a miſpriſion of the jurats: whether it be good or amendable, - 275
Trial by ten of the principal pannel and two of the *tales*, where there were but twenty-three in the *venire facias* returned: whether it be good, or is aided by any of the ſtatutes, - - 223, 224
Where twenty-three only are returned in the *venire facias*, and in the *habeas corpora* twenty-four are named and returned, and the twenty-fourth juror ſworn: whether it be good, or aided by the ſtatutes, 278
Trial of an iſſue by ſix jurors is not good, although alledged to have been uſed ſo by cuſtom, - - - 260
Whether the trial of ſheriff or no ſheriff ſuch a day, when proceſs was returned, ſhall be by the patent ſhewn, or *per pais*, 421
Cuſtom of *London* which concerns all the citizens, ſhall be tried *per pais*, - 517
Trial of inſtitution ſhall be by the biſhop; of induction *per pais*, - - 389
Where there may be trial in the ſpiritual court of a releaſe or other matter triable by the courſe of the common law, and where not, - - 237, 238

Trover and Converſion.

Where the day and place of the *trover* ought to be mentioned, - 262. 525
See tit. Action.

Tourn de Viſcount.

What time it ſhall be held, and how the amercements ſhall be levied, 275, 276
See Amercement.

Timber.

What ſhall be ſaid to be timber-trees, 531
See tit. Waſte.

Tithes.

What ſhall be good cauſe of diſcharge of tithes, - - - 393
Whether tithes ſhall be paid of foreſt lands in the hands of the king's purchaſors, which were ever diſcharged of tithes in the king's hands, - - - 94
Whether tithe ſhall be paid for abbey lands diſſolved by the ſtatute 27. *Hen.* 8. c. 20. 422, 423, 424
What ſhall be called *minutæ decimæ*, - 28
Whether tithe ſhall be paid for houſes in *London*, - - - 596
Whether an *ejectione firmæ* lies for tithes, 302
Whether they be within the ſtatute of 5. *Hen.* 6. c. 20. to have reſtitution, - 202
Tithes are payable for firewood, or wood for fences, unleſs there be a ſpecial cuſtom to diſcharge them, - - 113
Whether tithe ſhall be paid for the paſturage of ſheep fed to be ſpent in an houſe within the pariſh, - - 237
Whether tithe ſhall be paid for fiſh taken in the ſea or great rivers, - 264. 339
Whether for conies taken in a warren, 339
Whether for young trees planted in a nurſery upon purpoſe to be rooted up and ſold, 522
Whether tithe ſhall be paid for honey, 560
Whether it ſhall be paid of the bees themſelves, - - - 404

V.

Variance.

Betwixt the writ or bill and the count, where it ſhall be aided by the ſtatute of jeofails, and where not, - 272. 281, 282. 325
Betwixt the count and the indenture pleaded, where it makes the judgment erroneous, 314. 418

Venire Facias.

Of what place, and how it ſhall be, 17. 150. 162. 480

Bearing date before the action brought, and yet the trial thereupon good, 38. 90, 91
With the *teste* or day of return, varying from the roll, and before the *teste* of the writ, and the issue tried thereupon, whether amendable, - 38. 203, 204
Venire facias de novo awarded, where the trial is upon a record of *nisi prius* varying from the roll, although the plaintiff be non-suited, - - 203, 204
Where *venire facias de novo* shall be awarded, 284. 312
Whether a *venire facias* may be from the ward of a city, - 150. 164, 165
Venire facias against two, where the one is dead, after issue and trial thereupon: whether the judgment against the survivor be good, - - - 426
Where in a *venire facias summonitus est* was returned, where it ought to have been *attachiatus est*: whether good, - 91
Appeal by the son and heir of the death of his father against two, that the one *proditorie*, the other *felonice*, conspired his death: whether there ought to be one or several *venire facias* for the trial thereof, - 532
See tit. Trial.

Verdict.

If it do find matter varying from the declaration, where it shall hurt the declaration, and where not, - 151
Where it shall make an ill plea or issue good, 6. 152, 153. 168. 191
Verdict general as the plea is good, and not void for uncertainty, - 219
Verdict special not finding the plaintiff's title, and yet good, - - 22
Verdict finding the issue precisely for the plaintiff or defendant, and new matter contrary to it, is good according to the issue, and void for the surplusage found, 130, 131. 198. 212
Verdict find damages 20l. (to be paid in such a commodity, if by law it may be) it is a good verdict for the damages found, and void for the residue, - - 219
Verdict, where void by reason of repugnancy, - 495
Upon a writ of enquiry of waste, it finds that he made waste in less quantity, and doth not find, *quod nullum aliud fecit vastum*: whether it be good, - 414. 453
That the defendant *assumpsit*, where there be two several promises alledged: whether it be good, - - 219
Where it gives all in damages in an assise, for six years arrearages of a rent-seck, not mentioning it to be for arrearages, and yet shall be good,
That the church is void *per tempus semestre*, although it finds not the time of the avoidance, is good, - - 343
Obligation with a condition to pay upon the 31st of *September*: payment is pleaded to be at that day: and the verdict finds, there was no payment the said 31st of *September*, yet a good verdict, - - 53
Verdict certainly given and uncertainly returned, how it may be amended, 338
After verdict matter of form shall not be prejudicial, - - 90, 91
Where two contrary verdicts be given, the first cannot be avoided, unless by error or attaint, - - - 552
See *tit.* Venire Facias *and* Judgment.

Vi et Armis.

Where the omission of those words in indictments and declarations will make them vitious, - - 378. 407

Vicar.

Of what things he shall have tithes, as *minutæ decimæ*, - - - 25

Victuals and Victuallers.

What shall be said to be victuals, and who victuallers, &c. - 113. 231, 232

Vill.

Vill and parish shall be intended all one and the same, if the contrary appears not, 182
See tit. Fine.

Unity of Possession.

Where and what things it shall extinguish, 419

Voucher.

Whether one may vouch the king with a voucher over, - 96, 97
See tit. Infant.

Uses.

Where the limitation of the uses shall be for the limitation of the estate; and where it shall be construed larger than the estate, 239
Uses limited upon recovery, which is good by *estoppel*, shall bind the recoveree and his heirs, and all claiming under him, 389
Uses contingent, by what acts they may be destroyed, - - 102, 103
Who shall have the benefit of contingent uses, and by what acts they may be transferred, suspended, or destroyed. 359
Uses raised upon consideration of blood, 529, 530

Usury.

What shall be said usury within the statutes, - - 283
It shall not be usury where the agreement is not corrupt, - - 501
Permitted to be paid, if it exceeds not that which is allowed by the statutes, 273. 491

Out-

Outlawry.

Reverſed by plea: whether it be within the ſtatute of limitations, - 194, 195
Whether the outlawry of a juror ſhall be good cauſe to diſcharge an indictment, - 147
Where the defendant after imparlance pleads outlawry, and upon *nul tiel record* pleaded fails of the record, judgment ſhall be abſolutely given, and not a *reſpondes ouſter*, 566

W.

Wager of Law.

Where it lies, - - 187
In inferior courts it is not allowed, - 112

Wales.

Whether a *certiorari* lies to remove a record or indictment there found, 34. 331, 332
Where judgment is given in debt againſt a defendant in *Wales*, who dieth inteſtate, and one here takes letters of adminiſtration: whether any execution may be in *Wales*, - - - 34
Whether a writ of appeal may be brought in the next *Engliſh* county for a murder in *Wales*, - - 247, 248
Whether the courts in *Wales* might write to the archbiſhop or biſhops in *England* to certify baſtardy, matrimony, &c. 247. 342
How proceſs are there returnable from day to day, and not confined to fifteen days betwixt the *teſte* and return, 179. 254
They have juriſdiction to hold plea of lands not held of the king, - - 172
Trials may be there made in ſome places by ſix jurors only, - - 260
Cuſtoms in *Wales*, 171, 172. 231. 238. 247, 248. 254. 260. 332. 342. 344. 562. 570
See tit. Court of the Marches.

Ward and Wardſhip.

Whether a diſtreſs be maintainable for relief, or *pro valore maritagii*, - 533, 534
Whether the heir ſhall pay relief to other lords at his full age, where his land had been in ward to the king, by reaſon of other lands held *in capite*, - - 534
See *Quare Impedit.*

Warranty.

Where warranty deſcended and attached upon the heir in remainder is defeated by the entry of the tenant for life, who is not bound: whether it be defeated *quoad* the heir, - - - 145
Where warranty ſhall be ſaid to be collateral, and where it ſhall bar him who had right before, - - - 156
Where it is determined by the returning of the fee to the feoffor, - 305. 369
Whether warranty upon a feoffment to the uſe of the feoffee for his life, remainder for life, and after to the feoffor and his heirs, ſhall bind for the benefit of him in remainder, - 369, 370, 371
What ſhall be ſaid to be a warranty commencing by diſſeiſin, - 370. 433. 484
Where found by ſpecial verdict, although not pleaded, yet ſhall bind, - 145
How the recovery in value ſhall be in a warranty againſt the king, and how he ſhall recover over in value, - - 96, 97

Warren.

Waſte.

Whether the aſſignee of the leſſor ſhall have action of waſte for cutting down timber-trees during the leaſe for years, 242, 243
Wherein waſte alledged *in domibus gardinis et pomariis*, and a writ of enquiry of waſte awarded, the jury finding the waſte in cutting down two trees, where the waſte was aſſigned in cutting down twenty trees, and they do not find *quod ullum aliud fecit veſtum*: whether it be good, - 453
What judgment ſhall be given upon a *venire facias* in waſte, where ſeveral iſſues be joined, and the verdict is found in part for the plaintiff and part againſt him, 381
If in a writ of enquiry of waſte there be more than twelve ſworn: whether it be erroneous, - - 414
See tit. Writ.

Waver de Action.

The king may wave a demurrer or iſſue, but not any other againſt the king, without the attorney-general's conſent, - 347
Whether the plaintiff in an action of waſte brought for the cutting down and carrying away of a timber-tree may wave that action and bring an action of *trover*, 242, 243

Ways.

Whether the erecting of a gate upon the highway to open and ſhut with the hand be a nuiſance, - - 184, 185
Who ought to repair highways, 336

Wife. *See* Baron and Feme, *and* Feme Sole.

Wills. *See* Teſtament and Deviſe.

Witneſſes.

Ad teſtificandum make default, 522, 523. 540, 541
Perjured, - - 99

Words.

Words.

No words are treaſonable, unleſs made ſo by ſome ſtatute, - - 125
Of ſuch words as are not uſual the law doth not take any conuſance, - 554, 555
See tit. Action ſur Caſe, *and* Expoſition.

Woad and Weld.

Whether *minutæ decimæ*, - 28

Writ.

THE REGISTER is the rule of *original writs*, but *judicial writs* may be framed according to the direction and diſcretion of the court, 527
Where it ſhall be awarded to the coroners, where the ſheriff is plaintiff or defendant, 415, 416
Writ of right of advowſon, the manner of proceedings therein, 511. 574. 589, 590, 591, 592
Writ of *quod ei deforceat*, where it may be general and count ſpecial in what action he will, - - - - 444, 445
Writ demanding 15. *acr. jampna et bruerie*: whether it be uncertain, - - 179
Writ of enquiry of waſte is not a mere inqueſt of office, but in nature of a verdict; whereof an attaint lies, - - - 414
Writ to enquire of the preſerving of incloſures; how and in what caſes it ſhall be, 280, 281. 439, 440
Writ to certify that *J. S.* is a *baron*, and that proceſs ſhould not be awarded againſt him, but as againſt a peer of the realm, 205, 206
Writ awarded to a biſhop out of *Wales*; and whether it may be to the archbiſhop, 342
Writ of reſtitution awarded upon an ejectment for tithes, - - 201
Awarded to the eccleſiaſtical court, for the admitting and ſwearing of a churchwarden,
For the admitting and ſwearing of the clerk of a pariſh, - - 589
Writ of privilege, to diſcharge an attorney or clerk of the court from being preſſed for a ſoldier, - - - - 11
From being conſtable, &c. - 389
Writ of privilege for ſerjeants at law and their ſervants, to be ſued only in the common pleas, - - - 84, 85
Writ of *diſtringas villata circumadjacent. ad levand. ſepes*, &c. upon the ſtatute of 13. *Edw.* 1. - 280, 281. 439, 440. 580.

Jamq. noſter * Agricola, *poſteritati narratus et traditus, ſuperſtes erit.*
TACITUS *in vita* JULII AGRICOLÆ, *Socri ſui.*

* Γεώργος.